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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 700

MARY DEAN, JOSEPH DEAN, THOMAS DEAN, PATRICIA CATRON, *nee* DEAN, JOHN DEAN and MARY DEAN, Executrix of the Estate of Joseph Charles Dean, Deceased,
Petitioners,

VERSUS

MARIE KATHERINE JELSMA, *nee* DEAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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January, 1958.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 8-8750

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In the
Supreme Court of the United States
OCTOBER TERM, 1957

No. .....

MARY DEAN, JOSEPH DEAN, THOMAS DEAN, PATRICIA CATRON, *nee* DEAN, JOHN DEAN and MARY DEAN, Executrix of the Estate of Joseph Charles Dean, Deceased,
Petitioners,

VERSUS

MARIE KATHERINE JELSMA, *nee* DEAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Mary Dean, Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, John Dean, and Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Oklahoma in the above styled action numbered No. 37466 in said State Court.

OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma in the above styled action is cited in the official reports as *Dean* v. *Jelsma*, Okla., 316 P.2d 599, and in the

unofficial reports in the Oklahoma Bar Journal as *Dean v. Jelsma*, 28 O.B.J. 906, which opinion is appended nereto and appears herein at pages i to xix of the Appendix. The findings and judgment of the trial court are not officially reported but the said findings and judgment of the District Court of Oklahoma County in case No. 133,879 which were appealed to the State Supreme Court are appended hereto and appear herein at pages xx to xxix of the Appendix.

JURISDICTION

Petitioners seek review of the opinion and judgment of the Supreme Court of the State of Oklahoma entered June 25, 1957. The order of the Supreme Court of the State of Oklahoma denying petitioners' petitions for rehearing was dated and filed September 10, 1957. The order of the Supreme Court of the State of Oklahoma denying petitioners leave to file their second petitions for rehearing was dated and filed October 15, 1957. On October 22, 1957, the Court entered an order issuing mandate but staying the enforcement thereof until January 6, 1958, pending filing of a petition for writ of certiorari in the Supreme Court of the United States, and if such petition is filed on or before said date staying enforcement until such time as the Supreme Court of the United States renders a final decision herein, or until further order of said Court.

The jurisdiction of this Court is invoked under Sections 1 and 2 of Article III and Article VI of the Constitution of the United States and under 28 U.S.C., Section 1257 (3). The grounds on which the jurisdiction of this Court is invoked are as follows:

(1) That the judgment is not substantiated by the evidence by reason whereof petitioners are deprived of their property without due process of law and are denied the equal protection of the laws in violation of the constitutional rights of petitioners contrary to the provisions of Section 1 of the XIV Amendment to the Constitution of the United States and contrary to the provisions of Sections 6 and 7 of Article II of the Constitution of the State of Oklahoma and in conflict with the decisions of this Court.

(2) The proceedings of the trial court, the orders of the trial court, the decision and judgment of the trial court, and the opinion and judgment of the Supreme Court of the State of Oklahoma are all in violation of the constitutional rights of the petitioners in that the petitioners are deprived of their property without due process of law and in that the said defendants are denied the equal protection of the laws contrary to the provisions of Section 1 of the XIV Amendment to the Constitution of the United States and contrary to the provisions of Sections 6 and 7 of Article II of the Constitution of the State of Oklahoma and in conflict with the decisions of this Court.

(3) The decision and judgment of the trial court and the opinion and judgment of the Supreme Court of the State of Oklahoma are all in violation of the constitutional rights of the petitioners in that the same impair the obligations of contract contrary to the provisions of Section 10 of Article I and Section 1 of the XIV Amendment to the Constitution of the United States and contrary to the provisions of Section 15 of Article II of the Constitution of the State of Oklahoma and are in conflict with Section 29 of

Title 15, Oklahoma Statutes, and in conflict with the decisions of this Court and the applicable state law.

(4) The proceedings of the trial court, the orders of the trial court, and the decision and judgment of the trial court and the opinion and judgment of the Supreme Court of the State of Oklahoma are all in violation of the constitutional rights of the petitioners in that the petitioners were deprived of a trial by jury contrary to the provisions of the VII Amendment to the Constitution of the United States and contrary to the provisions of Section 19 of Article II of the Constitution of the State of Oklahoma and in conflict with Section 556 of Title 12, Oklahoma Statutes, and in conflict with the decisions of this Court and the applicable state law.

QUESTIONS PRESENTED

(1) That the judgment is not substantiated by the evidence by reason whereof petitioners are deprived of their property without due process of law and are denied the equal protection of the laws; and

(2) That the proceedings of the trial court, the orders of the trial court, the decision and judgment of the trial court, and the opinion and judgment of the Supreme Court of the State of Oklahoma are so consistently erroneous with utter disregard of the facts that by reason whereof petitioners are deprived of their property without due process of law and are denied the equal protection of the laws; and

(3) That the decision and judgment of the trial court and the opinion and judgment of the Supreme Court of the State of Oklahoma impair the obligations of contract; and

(4) That the petitioners were wrongfully deprived of a trial by jury in this action the gravamen of which is the recovery of real and personal property.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes which petitioners submit are controlling of the matters herein submitted are as follows:

The applicable portions of Sections 1 and 2 of Article III of the Constitution of the United States are as follows:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *.
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution * * *."

The applicable portion of Article VI of the Constitution of the United States is as follows:

> "* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding * * *."

The applicable portion of 28 U.S.C., Section 1257, is as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

"* * * (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States * * *."

The applicable portion of Section 1 of the XIV Amendment to the Constitution of the United States is as follows:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *."

Sections 6 and 7 of Article II of the Constitution of the State of Oklahoma are as follows:

"6. Courts of justice open—Remedies for wrongs—Sale, denial or delay.—The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

"7. Due process of law.—No person shall be deprived of life, liberty, or property, without due process of law."

The applicable portion of Section 10 of Article I of the Constitution of the United States is as follows:

"Section 10. No State shall * * * pass any * * * *ex post facto* Law, or Law impairing the Obligation of Contracts, * * *."

Section 15 of Article II of the Constitution of the State of Oklahoma is as follows:

"15. Bills of attainder—*Ex post facto* laws—Obligation of contracts—Forfeitures.—No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be passed * * *."

Section 29 of Title 15, Oklahoma Statutes, is as follows:

"29. Beneficiary may enforce.—A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

The VII Amendment of the Constitution of the United States is as follows:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The applicable portion of Section 19 of Article II of the Constitution of the State of Oklahoma is as follows:

"19. Trial by jury.—The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; * * *."

Section 556 of Title 12, Oklahoma Statutes, is as follows:

> "556. Trial of issues.—Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, * * *."

The applicable portions of Section 306 of Title 12, Oklahoma Statutes, are as follows:

> "What allegations deemed true.
>
> "* * * every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true * * *."

Section 630 of Title 12, Oklahoma Statutes, is as follows:

> "630. Formal exceptions unnecessary—What acts sufficient.—Formal exceptions to rulings or orders of the Court shall not be necessary; but for all purposes for which an exception has heretofore been necessary at the trial of a cause it shall be sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and his grounds therefor."

STATEMENT OF THE CASE

The respondent, Marie Katherine Jelsma, *nee* Dean, brought this action in the State District Court of Oklahoma County, Oklahoma, against these petitioners, the gravamen of which action was for the recovery of specific real and

personal property which was in the possession of her father at the time of his death.

The decedent, Joseph Charles Dean, married Julia Finnegan and of this marriage one child was born, Marie, the respondent herein. Soon thereafter the family moved from Colorado to Shawnee, Oklahoma, where Mr. Dean purchased and operated a bakery. On or about May 7, 1919, Julia Finnegan Dean died leaving no estate. Mr. Dean then moved to Oklahoma City, Oklahoma, bringing with him his minor daughter, Marie. Mr. Dean purchased the Capitol Furniture Store.

On October 27, 1922, Mr. Dean in contemplation of marriage to Mary Kahanek, now Mary Dean, one of the petitioners, entered into an ante-nuptial agreement with Mary Kahanek. Marie Katherine Dean, now Jelsma, while a contingent beneficiary under this agreement, was not named as a party to it and did not sign it.

Following the contemplated marriage Mr. Dean made and executed a will on December 9, 1922, in which he incorporated the ante-nuptial contract and cancelled all previous wills.

On November 17, 1929, Mr. Dean and his wife Mary, after the birth of two sons, Joseph and Thomas, both petitioners herein, cancelled in writing the said ante-nuptial agreement. On this same date Mr. Dean executed a new will cancelling all previous wills and ratified the agreement cancelling the ante-nuptial agreement. Marie continued to live with her father after his marriage until April, 1924, when she married Henry Jelsma and moved to another address.

Thereafter, on May 3, 1938, after two more children, a boy and girl, John and Patricia, both petitioners herein, had been born of said marriage, Mr. Dean executed a new will cancelling all previous wills in which he recognized all five of his children which said will was admitted to probate in the County Court of Oklahoma County, Oklahoma, on the 12th day of July, 1954.

During the years that followed the Dean family raised their children and operated his store until his death on the 28th day of May, 1954, at the age of 87 years. At the time of his death all of his children had become of age except John.

Following the death of her father, Joseph Charles Dean, the respondent brought this action against her stepmother individually and as executrix of her father's estate and against her three half-brothers and one half-sister for one-half of all property, real and personal, that her father owned at the time of his marriage to Mary Kahanek and one-half of all the increase thereof. The trial court rendered judgment for the respondent which gave her one-half interest in all property shown in the ante-nuptial agreement and one-half interest in all the increase thereof. The Supreme Court of the State of Oklahoma affirmed the judgment of the trial court. Two members of the State Supreme Court joined in a vigorous dissenting opinion which at the outset stated:

> "The majority opinion here so misconstrues the facts and law in this case I am compelled to dissent."

With this in mind, every clause of the majority opinion should be carefully verified.

Although the pleadings are long, the issues of fact are simple. At the time of his death, Joseph Charles Dean was in possession and held the legal title, either individually or as a joint tenant with his wife, Mary Dean, to all the property involved in this appeal of a value in excess of one hundred thousand dollars. The respondent daughter contended that she had an equitable title to an undivided one-half interest in and to said property of which she sought recovery. Her contention is based upon such equitable title arising in one of several ways.

First, she contends that she inherited her mother's interest; that her mother had had an equitable undivided one-half interest in the property owned by Joseph Charles Dean, her husband. However, even if her mother had had the legal title to an undivided one-half interest, upon her death, her daughter would have received only one-half of her interest or one-fourth of the total property of the parties and her husband would have received one-half of her interest or one-fourth of the total property of the parties which added to his interest already acquired would have given him a three-fourth's interest in the total property. The greatest interest the respondent could have acquired by inheritance from her mother would have been an one-fourth interest.

The evidence fails to disclose that respondent's mother had any property at her death. Everything was owned by and was in the father's name. It was not necessary to probate the mother's estate for she had none.

The Supreme Court of the State of Oklahoma has held that even where property had been jointly acquired dur-

ing coverture but stood of record in the name of the husband alone and the wife had taken no steps to determine her interest therein, it is not such a vested interest in her as will descend to her children upon her death during the lifetime of her husband such as would reduce his interest therein. In the case of *Jones, et al,* v. *Farris*, 180 Okla. 341, 69 P.2d 34½, Syllabus No. 3 by the Court states:

> "Where property jointly acquired during coverture is of record in the name of the husband, no question of resulting trust being involved, and the husband is still living, and the wife has taken no steps to determine her interest therein, it is not such a vested interest in her as will descend to her children upon her death, intestate, during the lifetime of her husband, so as to reduce his interest therein."

Thus, under the Oklahoma decisions the respondent would have acquired no interest in the property of her father even if it had been jointly acquired property which it was not.

Next, respondent contends that she received her mother's interest by gift. Her only evidence of this was her own testimony that her mother at one time told her "that what was hers was mine" (Tr. 211). This is no evidence that any of the property standing in the name of Joseph Charles Dean belonged to his first wife. Moreover, by itself, this is insufficient evidence to establish a gift. There is no proof of the essential elements of a gift—such as delivery, etc., nor of the subject of the purported gift. *Flesher* v. *Flesher* (Okla.), 258 P.2d 988; *Foster* v. *Rose*, 205 Okla. 397, 238 P.2d 332.

Next, respondent contends that she is entitled to a half interest in said estate by virtue of the said ante-nuptial contract (Tr. 348 to 354). She contends that either the contract acknowledges her interest and thereby vested the interest claimed in her, or that the contract was made for her benefit and could not be rescinded without her consent and thereby vested the interest claimed in her, or that the contract coupled with the first will made following the execution of the said ante-nuptial contract thereby vested the interest claimed in her. The issues to be resolved by each of these contentions are one of law that may be resolved by a simple reading of the ante-nuptial contract.

The ante-nuptial contract does not give respondent any interest and does not acknowledge in her any interest except such as may arise upon the happening or not of certain events. At most she had a contingent interest which failed to vest in her. The contract neither gave nor acknowledged any equitable interest in the plaintiff. No such inference can be validly drawn therefrom.

The terms of the ante-nuptial agreement provided that in case the parties had children provision would be made for them as provided by law or will made by the said Joseph Charles Dean at any time. This provision appears as follows:

> "That if there are any direct blood descendants, heirs of the said husband and wife, inheriting through both of them jointly, said heirs shall share first as provided for them by law or will made by the said Joseph Charles Dean at any time, and then the property remaining shall be disposed of in accordance with all the provisions and purposes of this contract and the said

will; and of the said will and the said contract the said will shall prevail."

This contingent interest set out in the said contract vested and became effective upon the death of Joseph Charles Dean for the reason that following the said marriage, the said husband and wife had direct blood descendants inheriting through both of them. Furthermore, it should be noted that in the event that there be such direct blood descendants, that the said Joseph Charles Dean could at any time make a will providing for them, and that in such event it is a provision of this contract that such will shall prevail over the terms of the said contract.

The first and the last wills were each permitted to be made by the terms of the contract. The last will (Tr. 319-323) was admitted to probate and in it the respondent did not receive the interest she claims. She seeks to rely upon a will which was cancelled to support her claim. The order admitting the last will was unappealed from and the respondent is bound thereby. The pleadings admitted the ante-nuptial contract, the first and last wills, the probate of the last will, the written rescission of the ante-nuptial contract, the birth of additional children, the only interest that respondent had was as a salaried employee and such employment was terminated for just cause, and respondent had knowledge of the rescission and acquiesced, permitted and allowed the decedent to deal with the property as his sole and separate property for more than 30 years. On the pleadings, petitioners were entitled to judgment. Section 306 of Title 12, Oklahoma Statutes.

There was no evidence of any family settlement agreement between respondent and Joseph Charles Dean. Such finding by the Supreme Court of the State of Oklahoma is entirely without support in the evidence. To presume such an agreement is an arbitrary and capricious act on the part of the court to evade the constitutional guaranties of the petitioners by founding the judgment upon grounds in a form unreviewable.

Since the ante-nuptial contract was rescinded (Tr. 366) the respondent could acquire no interest of any sort by virtue of the contract. A contract may be revoked by the consent of the parties thereto which was done in this case. The respondent was not a party to the contract and her consent was not necessary. *Turner* v. *Zachary* (Okla.), 269 P.2d 773; Section 29 of Title 15 of Oklahoma Statutes.

Mr. Dean at no time placed his property under the control of the respondent. He at no time recognized that she had any right in the property that he owned at his first wife's death. He never at any time placed his property beyond his control and he specifically provided that the property should be returned to him if he and Mary Kahanek Dean were to separate. Any rights that respondent got from the ante-nuptial agreement were purely contingent upon the happening of certain events which never happened. Regardless of whether the contract was revoked or not, by its terms, it did not vest the interest claimed in the respondent.

Certainly no irrevocable trust was ever created for the respondent by virtue of this agreement. Such a finding that a trust was created is but reading terms into the agreement which are not there. Likewise, the legal pre-

sumptions and inferences which arise from the evidence are that the decedent was the owner of his property either individually or as joint tenant with his wife, Mary Dean. The presumptions indulged by the court are not founded upon the evidence or the law of the case.

A careful analysis of the pleadings and the evidence show that a gross miscarriage of justice has been perpetrated in the case at bar to the prejudice of the rights of the petitioners. Such conduct on the part of the trial court and the Supreme Court of the State of Oklahoma is manifestly unfair and should not be condoned by this Court.

The record pertaining to the Federal questions sought to be reviewed being voluminous, the portions relied upon are appended hereto and appear herein at pages xxix to lxxiv of the Appendix.

Prior to the commencement of the trial of the case in the District Court on February 27, 1956, the petitioners made their Motions for Judgment on the Pleadings and Objections to the Introduction of Evidence which motions and objections were by the trial court overruled and exceptions were allowed said petitioners. Also said petitioners filed their written demands for trial by jury and made oral demands for a jury trial which demands and motions were overruled by the trial court and exceptions were allowed said petitioners.

After the commencement of the trial the petitioners made their Motions for Judgment on the Pleadings and Opening Statement which motions were by the trial court overruled and exceptions were allowed said petitioners. During the trial the petitioners made their Objections to

the Competency of the Plaintiff to Testify which objections were by the trial court overruled and exceptions were allowed said petitioners. Also the petitioners made their objections to the introduction into evidence of the deposition of the respondent which objections were overruled, the deposition was admitted, and exceptions were allowed said petitioners. At the close of all of the evidence the petitioners made their Motions for Judgment at Close of Evidence which motions were by the trial court overruled and exceptions were allowed said petitioners.

After judgment was entered in favor of the respondent the petitioners filed their Motions for a New Trial which motions were by the trial court overruled and exceptions were allowed said petitioners.

Thereafter, petitioners perfected an appeal to the Supreme Court of the State of Oklahoma and filed their Petitions in Error and Supporting Briefs. The said Supreme Court entered its opinion affirming the judgment of the trial court. Whereupon, petitioners filed their Petitions for Rehearing which petitions were denied by said Supreme Court. Petitioners filed their Applications for Leave to File their Second Petitions for Rehearing which applications were denied by said Supreme Court.

This Court has held that due process of law is not satisfied by mere formal procedural correctness. *Foster v. People of State of Ill.* (Ill., 1947), 67 Sup. Ct. 1716, 332 U.S. 134, 91 L. Ed. 1955.

Further a state may not avoid the federal question of whether or not a federal right has been denied in substance by interposing a non-federal ground for its decision. *An-*

cient Egyptian Arabic Order N.M.S. v. *Michaux*, 279 U.S. 737, 73 L. Ed. 931; *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 89 L. Ed. 2092.

A state may not avoid review of its judgment by casting it in a form not reviewable. *Williams* v. *North Carolina*, 325 U.S. 226, 89 L. Ed. 1577.

A state may choose the procedure but where it closes the door to consideration of the denial of the federal right it is not simply a question of state procedure. *Young* v. *Rage*, 337 U.S. 235, 93 L. Ed. 1333.

Local grounds for decision may not be used to cloak an infringement of the constitutional guaranties. *Bain Peanut Co.* v. *Pinson*, 282 U.S. 499, 75 L. Ed. 482.

This Court has the power to search the whole record to see if a federal question is presented. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 73 L. Ed. 184.

In the case at bar both the trial court and the State Supreme Court have attempted to cast their judgment upon unreviewable findings of fact which are not substantiated by the evidence in order to avoid the federal questions. An examination of the record clearly shows a denial of petitioners' substantial constitutional rights although an attempt has been made to go through a formal procedure before entering judgment.

REASONS FOR GRANTING THE WRIT

Point I.

The Writ of Certiorari should be granted for the reason that the judgment is not substantiated by the evidence by reason whereof petitioners are deprived of their property without due process of law and are denied the equal protection of the laws.

Where the findings of a state court are without support in the evidence, including any reasonable inferences that may be drawn from the evidence, then such findings and judgment pursuant thereto deny due process of law and are not conclusive upon and will be disregarded by the Supreme Court of the United States. *Ward* v. *Krinsky*, 259 U.S. 503, 66 L. Ed. 1033; *Darlington* v. *Turner*, 202 U.S. 195, 50 L. Ed. 992; *United States ex rel Vajtauer* v. *Comr. of Immigration*, 273 U.S. 103, 71 L. Ed. 560.

Although the claimed constitutional protection be denied by a state court on non-federal grounds, the Supreme Court of the United States may inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, the constitutional obligations may not be thus avoided. *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 76 L. Ed. 1102; *Ward* v. *Love County*, 253 U.S. 17, 64 L. Ed. 751.

The Supreme Court of the United States has the ultimate power to search the record in the state court in order that no constitutional freedom be defeated by insubstantial findings of fact screening reality. *Milk Wagon Drivers U.* v. *Meadowmoor Dairies*, 312 U.S. 287, 85 L. Ed. 836; *Truax* v. *Corrigan*, 257 U.S. 312, 66 L. Ed. 254.

The Supreme Court of the United States gives deference to the conclusions of state courts on issues of fact which are disputed in the evidence, but will decide for itself, on facts that are undisputed, the constitutional validity of a judgment that denied claimed constitutional rights. *Gallegos* v. *Nebraska*, 342 U.S. 55, 96 L. Ed. 86.

A presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, or if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. *Tot* v. *United States*, 319 U.S. 463, 87 L. Ed. 1519; *Cases* v. *U. S.*, 131 F.2d 916, *certiorari denied*, 319 U.S. 770, 87 L. Ed. 1718; *People* v. *Wells*, 33 Cal.2d 330, 202 P.2d 53, *certiorari denied*, 70 Sup. Ct. 43, 338 U.S. 836, 94 L. Ed. 510.

On review the United States Supreme Court may in considering the evidence consider the admitted facts. *Truax* v. *Corrigan*, 257 U.S. 312, 66 L. Ed. 254.

On reviewing the evidence in the case at bar, the record discloses that the trial court and State Supreme Court decided the case upon a set of fictitious facts taken from allegations made by respondent in her petition but which facts were without support in the evidence.

This case represents a flagrant example of both a trial court and a State Supreme Court going through the motions and form of a trial and appeal but by arbitrary action and mandate on their part denying the petitioners their fundamental rights to a fair trial with a judgment substantiated by the evidence. Such conduct is palpably wrong and should not be condoned by this Court. Rather this Court

should take notice of the action denying petitioners constitutional rights and provide a remedy here which was denied below.

Point II.

The Writ of Certiorari should be granted for the reason that the proceedings of the trial court, the orders of the trial court, the decision and judgment of the trial court, and the opinion and judgment of the State Supreme Court are so consistently erroneous with utter disregard of the facts that by reason whereof petitioners are deprived of their property without due process of law and are denied the equal protection of the laws.

The Constitution of the United States provides that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. Section 1, XIV Amendment of Constitution of the United States.

The Constitution of the State of Oklahoma provides that right and justice shall be administered without denial and that no person shall be deprived of their property without due process of law. Sections 6 and 7 of Article II of Constitution of Oklahoma.

The constitutional guaranties are designed to protect the individual from the state, or arms of the state. *El Paso County Water Imp. District No. 1* v. *City of El Paso*, 133 F. Supp. 894; *City of Trenton* v. *State of New Jersey*, 262 U.S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937; *City of Chicago* v. *Sturges*, 222 U.S. 313, 32 Sup. Ct. 92, 56 L. Ed. 215.

Under the Constitution of the United States all persons within the jurisdiction of a state are entitled as of right to

the equal protection of its laws. *McCoy* v. *Providence Journal Co.*, 190 F.2d 760, *certiorari denied*, 72 Sup. Ct. 200, 342 U.S. 894, 96 L. Ed. 669; *Trauax* v. *Raich*, 239 U.S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131.

No set of inflexible standards may be established by which it can be determined under the Fourteenth Amendment whether there has been due process of law and each case must be adjudicated on its own peculiar facts. *United States* v. *Waller*, 126 F. Supp. 537, *certificate denied*, 224 F.2d 280, *certiorari denied*, 76 Sup. Ct. 217, 350 U.S. 922, 100 L. Ed. 807.

Action of state courts and state judicial officers in their official capacities is "state action" within the provision of Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law. *Kenny* v. *Fox*, 132 F. Supp. 305, *affirmed*, 232 F.2d 288; *Shelley* v. *Kraemer*, 334 U.S. 1, pages 14 to 17, 68 Sup. Ct. 836, 92 L. Ed. 1161.

The primary purpose of the constitutional guaranty of due process is security of the individual from arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice. *Rein* v. *Johnson*, 149 Neb. 67, 30 N.W.2d 548, *certiorari denied*, 69 Sup. Ct. 31, 335 U.S. 814, 93 L. Ed. 369.

The constitutional guaranties of due process and equal protection both call for procedures which allow no invidious discriminations between persons and different groups of persons. *Griffin* v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 Sup. Ct. 585, *rehearing denied*, 76 Sup. Ct. 844, 351 U.S. 958, 100 L. Ed. 1480.

Purposeful discrimination may be shown by a series of systematic rulings or by the unequal application of the law to such an extent as to show intentional discrimination. *Akins* v. *Texas*, 325 U.S. 398, 89 L. Ed. 1692, 65 Sup. Ct. 1276, *rehearing denied*, 66 Sup. Ct. 86, 326 U.S. 806, 90 L. Ed. 491.

The hearing, such as would satisfy due process of law, must be a real one, not a sham or a pretense. *Palko* v. *Connecticut*, 58 Sup. Ct. 149, 302 U.S. 319, 82 L. Ed. 288; *Moore* v. *Dempsey*, 261 U.S. 86, 67 L. Ed. 543, 43 Sup. Ct. 265; *Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 Sup. Ct. 340.

Though a law be fair on its face and impartial in appearance, yet, if it is administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Yick Wo* v. *Hopkins*, 6 Sup. Ct. 1064, 118 U.S. 373, 30 L. Ed. 220; *Richey* v. *Wells*, 123 Fla. 284, 166 So. 817; *Montgomery* v. *Suttles*, 191 Ga. 781, 13 S.E.2d 781; *Howard Sports Daily* v. *Weller*, 179 Md. 355, 18 A.2d 210.

On reviewing the proceedings of the trial court, the orders of the trial court, the decision and judgment of the trial court and the opinion and judgment of the State Supreme Court the record discloses that the same are so consistently erroneous and to such an extent as to violate petitioners' constitutional rights.

Where the record reveals that the conduct of the trial court and the State Supreme Court in dispensing justice was so one sided without warrant in the facts of the case,

this Court should take jurisdiction and protect the constitutional rights of the petitioners and issue its mandate to the state courts that this Court will not stand aside where a person or a single individual is being deprived of his property by the arbitrary action of a court without any evidence to sustain such action.

The constitutional guaranties of due process and equal protection of the law should not only extend to the members of a group who are discriminated against but should likewise extend to each individual person who, although not a member of a group, is denied his constitutional rights.

The constitutional guaranties safeguarded by the Fourteenth Amendment are not limited to only where a denial of the same occurs where the parties are of different races. The protection afforded extends to all persons regardless of why the state violated these sacred rights, whether it be race, creed or other influence. The significant factor is that the right is violated although by supposition we may speculate the reasons for such denial. It is the denial that is forbidden rather than the speculative reasons therefor.

In the case at bar petitioners filed appropriate motions to bring the case to issue which were each overruled by the trial court although the same had merit. Petitioners filed their respective demurrers (Tr: 52 to 53 and 96 to 97) which were each overruled (Tr. 54 to 55 and 98) by the trial court although the facts pleaded taken with the facts admitted in the petition did not entitle the respondent to recover judgment against the petitioners. Petitioners filed their respective answers (Tr. 56 to 69, 71 to 72, 99 to 101, 102 to 104,

105 to 107, and 108 to 110) in which they pleaded affirmative defenses. Respondent failed to file her reply, the legal effect of which admitted the truth of the defenses pleaded in the answers. Petitioners thereafter filed written motions and objections prior to the commencement of the trial, and at the trial, and following the trial which were each overruled and some of which appear herein at pages xxiv to lxxiv of the Appendix. In addition petitioners made countless objections pertaining to the conduct of the trial and the admission of evidence which were overruled by the trial court. Petitioners filed their Petitions in Error (Tr. 1-A to 28-A) and perfected their appeal to the State Supreme Court which affirmed the judgment of the trial court, which opinion appears herein at pages i to xix of the Appendix. Petitioners filed their Petitions for Rehearing (Tr. 503 to 544) which were denied (Tr. 545) by the State Supreme Court. Petitioners filed their Applications for Leave to File Their Second Petitions for Rehearing (Tr. 546 to 592) which were denied (Tr. 593) by the State Supreme Court. Reviewing the various motions made and rulings of the trial court thereon, the decision and judgment of the trial court and the opinion and judgment of the State Supreme Court, the same show intentional discrimination by a series of arbitrary and systematic rulings and holdings. Regardless of the merit of petitioners' motions, etc., the same were consistently overruled to the prejudice of petitioners' rights.

The judgment of the trial court and the opinion of the State Supreme Court are founded upon a fictitious set of facts unsupported by the evidence by way of which the state courts seek to avoid the constitutional issues.

Point III.

The Writ of Certiorari should be granted for the reason that the decision and judgment of the trial court and the opinion and judgment of the Supreme Court of the State of Oklahoma impair the obligations of contract.

The Constitution of the United States provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Section 1, XIV Amendment of the Constitution of the Unit[illegible] States.

Further the Constitution of the United States provides that no state shall pass any law impairing the obligations of contract. Section 10 of Article I of the Constitution of the United States.

The Constitution of the State of Oklahoma provides that no laws impairing the obligations of contract shall ever be passed. Section 15 of Article II of the Constitution of the State of Oklahoma.

The statutes of the State of Oklahoma provide that a contract made expressly for the benefit of third persons may be enforced at any time before the parties thereto rescind it. Section 29 of Title 15 of Oklahoma Statutes.

The Supreme Court of the State of Oklahoma has held that a contract to make a will is enforceable by the heirs, for whose benefit the contract was made, as third party beneficiaries. *Tucker* v. *Zachary* (Okla.), 269 P.2d 773; *Eggstaff* v. *Phelps*, 99 Okla. 54, 226 Pac. 82. However, in the case at bar the State Supreme Court treated one of the heirs for whose benefit the said ante-nuptial contract was purported to have been made as a party to the agreement.

An examination of the said contract shows that the respondent was not a party to the contract and such rights that she would have to enforce the said contract must arise by virtue of being a third party beneficiary to the contract under the former holdings of the State Supreme Court. By holding that the beneficiary was a party to the contract the court by judicial decision imposed upon the other parties to the contract the additional burden of securing the consent of the respondent prior to rescission of the contract. Thus by change in judicial decision the court seeks to void the contract of rescission made by the parties signing the said ante-nuptial agreement. By this action the obligations of the ante-nuptial contract as rescinded are impaired. Prior to the decision of the State Supreme Court in the case at bar the law of the State provided that the parties to a contract could rescind the same at any time before suit by a third party beneficiary. Under this law the rescission was valid and binding and served to extinguish any rights third party beneficiaries may have had by virtue of the said contract. This rescission served to vest the respective rights of the parties with relationship to the cancellation of the ante-nuptial contract and the contract of rescission itself thereupon determined the obligations of contract pertaining thereto. By the judgment of the Oklahoma Court in this case construing a third party beneficiary to be a party to the contract, the said judgment serves to impair the obligations of contract.

Where a statute is construed and such construction is applied through decisions which are later changed, rights acquired prior to such change cannot be affected retroactively or benefits received as result thereof be required

to be returned. *Henry Clay and Bock & Co. v. United States*, 205 F.2d 160; *Aetna Life Ins. Co.* v. *Hoppin*, 214 Fed. 928; *Mobile & O. R. Co.* v. *State of Tennessee*, 153 U.S. 486, 38 L. Ed. 793.

This Court has further held that it will determine for itself the question of the existence or non-existence of a contract and the terms thereof and whether the judgment of the State Supreme Court by its terms or necessary operation gives effect to a provision of state law which impairs the obligations of contract. *Mobile & O. R. Co.* v. *State of Tennessee (ante)*, at pages 492 and 493.

Since an examination of the record reveals that the ante-nuptial contract was made and rescinded by the parties thereto under the law in force at the time of the making and rescission thereof, the decision of the state court in the case at bar imposing additional requirements to effect the rescission of the contract, impairs the obligations of contract existing between the parties following the said rescission and prior to the judgment in this case. Further, the action of the courts in misconstruing the terms of the contract serves to impair the obligations of contract arising therefrom.

Point IV.

The Writ of Certiorari should be granted for the reason that the petitioners were wrongfully deprived of a trial by jury in this action the gravamen of which is the recovery of real and personal property.

The Constitution of the United States preserves the right to a trial by jury in suits at common law (VII Amendment of the Constitution of the United States).

The Constitution of the State of Oklahoma provides the right to trial by jury shall remain inviolate. Section 19 of Article II of the Constitution of the State of Oklahoma.

By statute the Oklahoma law provides that issues of fact arising in actions for the recovery of specific real or personal property shall be tried by a jury. Section 556 of Title 12, Oklahoma Statutes.

This Court has held that an action for the recovery and possession of specific real or personal property is one at law and the parties are entitled to a trial by jury. *Whitehead* v. *Shattuck*, 138 U.S. 146, 34 L. Ed. 873.

Where plaintiff claimed title to property by an unrecorded deed and sought the recovery thereof and to quiet her title therein, the Oklahoma Supreme Court held that the defendant was entitled to a jury trial. *Fitz-Gerald* v. *Lightfoot*, 180 Okla. 598, 71 P.2d 707. Syllabus No. 1 and No. 2 by the Court appear as follows:

> "1. In actions for the recovery of specific real property, the right to jury trial of issues of fact is fixed by statute.
>
> "2. The right to jury trial in actions for recovery of specific real estate is not necessarily affected by the fact that plaintiff also seeks to have his title set at rest or quieted."

At page 708, the Court stated that the purpose of the action was to establish interest in real estate and to award possession thereof and to quiet title. The statement by the Court appears as follows:

"The purpose of the action was to establish interest in specific real estate and to award possession thereof and quiet title."

and at page 709, the Court held that the gravamen of the action was the recovery of specific real property and that the defendants were entitled to a trial by jury. The statement by the Court appears as follows:

"The gravamen of the action was the recovery of specific real property, and the defendants were entitled to trial by jury, as provided in section 350, O.S. 1931 (12 Okla. St. Ann. Sec. 556)."

Where the plaintiff brought an action to cancel deeds, for possession and for an accounting, the Oklahoma Supreme Court held that the action was primarily an action in ejectment to recover possession of specific real property, and as an incident thereto equitable relief was asked, and the denial of a jury trial was reversible error. *Thompson* v. *Smith*, 102 Okla. 150, 227 Pac. 77.

Where the plaintiff brought an action to quiet title and to cancel a contract, and defendant filed a cross-petition alleging the will was inoperative as to her, that she was the owner of an aliquot part of the land, praying cancellation of plaintiff's muniments of title and for an accounting of rents and royalties, the Oklahoma Supreme Court held that the primary purpose of the action was the recovery of specific real property and that the denial of a jury trial constituted error. *Grace* v. *Hildebrandt*, 110 Okla. 181, 237 Pac. 98.

Where plaintiff brought an action in the nature of ejectment for the recovery of property and to quiet title, the Oklahoma Supreme Court held that it was error to deny

the plaintiff a jury trial on the grounds that equitable issues are injected by the pleadings. *Evans* v. *Bank of F. C. Finerty & Co.*, 201 Okla. 485, 207 P.2d 272.

Where the plaintiff brought an action to recover possession of real property and to quiet title thereto the Oklahoma Supreme Court held that the action was in the nature of a common-law ejectment action and is triable to a jury. *Eckroat* v. *Landrum*, 205 Okla. 119, 235 P.2d 705.

Since the primary objective of respondent's action was to establish her interest in certain property and to recover the possession of the same, the parties are entitled to a trial by jury, and the denial of the written and oral demands for a trial by jury made by the petitioners at the commencement of the trial violated petitioners' constitutional right to a trial by jury in this case.

CONCLUSION

The petition for certiorari ought to be granted.

Respectfully submitted,

RICHARD J. SPOONER,
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Oklahoma City, Oklahoma,
Attorney for Petitioners.

January, 1958.

APPENDIX

OPINION AND JUDGMENT OF STATE SUPREME COURT

Filed
In Supreme Court
of Oklahoma
Jun 25, 1957

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MARY DEAN, JOSEPH DEAN, THOMAS DEAN, PATRICIA CATRON, nee Dean, JOHN DEAN, and MARY DEAN, Executrix of the Estate of Joseph Charles Dean, deceased, Plaintiffs in Error,	)	
vs.	)	No. 37,466
MARIE KATHERINE JELSMA, nee Dean, Defendant in Error.	)	

SYLLABUS

1. The competency of a party to testify under 12 O.S. 1951, Sec 384, is waived by the adversary taking such party's deposition and requiring him to testify concerning transactions with the deceased person from whom he acquired his cause of action.

2. In a case of equitable cognizance, to declare a constructive trust on property in the hands of an executrix, it is not error to refuse a demand for a jury trial, even though the decision of the case may have the incidental and ultimate result of deciding ownership of real property.

3. Where all the facts alleged in defendants' answers could be proved under a general denial and amount to a traverse of plaintiff's allegations in her petition, a reply is not necessary.

4. An antenuptial contract, and the contractual features of a will made in conformity therewith, made not only for the benefit of a child of a former marriage, but to which said child was actually a party, though not signing same, cannot be rescinded or abrogated by the husband and wife, after marriage, without the knowledge and consent of such beneficiary and party.

5. As a matter of public policy, courts look with favor upon family settlement agreements, and they will ordinarily be upheld when made with full understanding of the facts and without fraud, undue influence or imposition, and this is true even though it might afterward appear that at the time the family settlement contract was made one of the parties thereto actually had no enforceable right to the property, subject to the contract.

6. Where one obtains or retains legal title to property under circumstances which renders it unconscionable for the holder of the legal title to retain it and enjoy the beneficial interest, equity will impress a constructive trust on the property so acquired in favor of the party who is equitably entitled thereto.

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA
HON. GLEN O. MORRIS, JUDGE

Action to enforce terms of antenuptial contract and contractual features of will made in conformity therewith by child of former marriage, beneficiary of and party to such contract, against executrix of deceased father's estate, to impress a trust upon property in hands of such executrix and for accounting. From judgment for plaintiff, defendants, executrix and children by second marriage, appeal.

AFFIRMED.

Charles D. Scales and Lee G. Gill, Oklahoma City, Oklahoma,	For Plaintiffs in Error Mary Dean, individually, and as executrix of Estate of Joseph Charles Dean, deceased.
John F. Eberle, and Richard J. Spooner, Oklahoma City, Oklahoma,	For Plaintiffs in Error Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, and John Dean.
Richard J. Spooner, Oklahoma City, Oklahoma,	For Plaintiff in Error Guardian *ad litem* of John Dean, a minor.
Charles Hill Johns, Oklahoma City, Oklahoma,	For Defendant in Error.

CORN, V.C.J.

Marie Katherine Jelsma, nee Dean, brought this action in the District Court of Oklahoma County against Mary Dean, individually and as executrix of the estate of Joseph Charles Dean, deceased, Thomas Dean, Joseph Dean, Patricia Catron, nee Dean, and John Dean to establish her equitable title in and to an undivided one-half interest in certain real and personal property, and the increase or conversion thereof, legal title to which was in said deceased, and to impress a trust thereon in the hands of said executrix, for delivery of proper conveyances thereof, and for an accounting. Judgment was rendered granting plaintiff the relief prayed for. From separate orders overruling mo-

tion for new trial, Mary Dean, individually and as executrix, and Thomas Dean, *et al.*, appeal.

The uncontradicted evidence of plaintiff, together with reasonable inferences drawn therefrom, reasonably tends to show that plaintiff was the only child of the marriage of Joseph Charles Dean and Julia Finnegan Dean; that during their marriage Joseph Charles Dean and Julia Dean accumulated through their joint efforts a substantial amount of real and personal property; that some of said property was carried in the names of husband and wife jointly, and some real property in the name of husband alone; that a part of said property was a bakery in Shawnee which was operated by the husband and wife together and also Marie Katherine; that in 1919 they sold the bakery for a substantial sum, part cash and the balance secured by a mortgage which was afterward paid; that a home was purchased in Oklahoma City, with the intent of moving there, but before such move was made Julia Dean, after a short illness, died; that so far as plaintiff knew no probate of her estate was had; that plaintiff and her father, after the death of Julia Dean, entered into an agreement, in the nature of a family settlement, whereby plaintiff's interest in and ownership of the property owned by her mother prior to her death, as well as the interest which plaintiff would have in the remainder of the property was agreed upon and fixed; on this point plaintiff testified that she obtained the ownership of a one-half interest in all of the property accumulated by the joint efforts of her mother and father through inheritance from her mother and by gift, "fifty-fifty"; that after her mother's death plaintiff and her father moved to the home in Oklahoma City and thereafter negotiated for and purchased a furniture store which they operated together, and plaintiff also assisted in looking after other rental property and mortgages; two disinterested witnesses testified to statements made by Joseph Charles Dean tending to show that he recognized and acknowledged that Marie

Katherine owned an interest in the property standing in his name; that in 1922 Joseph Charles Dean desired to marry one Mary Kahanek; that he and Marie Katherine discussed the making of an antenuptial contract and will with an attorney, who drew an antenuptial contract and discussed its provisions with Marie Katherine and her father; that thereafter, on October 27, 1922, executed said antenuptial contract in Marie Katherine's presence and a copy thereof was given to Marie Katherine; that about a month after the marriage of Joseph Charles Dean and Mary Kahanek he executed a will, dated December 9, 1922, in conformity with the provi[illegible]ns of the antenuptial contract, in which he devised an [illegible]idivided one-half interest in all his property to Marie Katherine and the other half to his new wife and incorporated in said will as a part and parcel thereof a copy of the antenuptial contract; a copy of this will was also given plaintiff; that plaintiff continued to work in the furniture store and assist her father in the management of said property after the marriage; that after the death of her father, on May 28, 1954, she learned for the first time that her father had executed a new will on May 3, 1938, in which he attempted to revoke all prior wills and rescind the antenuptial agreement, and by the terms of which plaintiff was given $2,000. and all the remainder of the property standing in his name was left to Mary Dean, his widow, and the four children of his marriage with Mary Kahanek Dean, the defendants above named; that said will of May 3, 1938, was admitted to probate in the County Court of Oklahoma County as the last will and testament of said deceased on July 12, 1954; plaintiff instituted this action in District Court on July 26, 1954.

The antenuptial contract and will made in conformity therewith, above referred to, were introduced in evidence. The antenuptial contract provides that it shall be binding upon the parties thereto, their heirs, executors, administrators, and assigns, and "upon any and all other persons what-

soever interested in same in any way"; it lists the property, real and personal, standing in the name of Joseph Charles Dean as of the date of the contract, of the total stated value of $48,960; it further provides that any consideration to or from Marie Katherine Dean, his dependent daughter, "who it is agreed may carry out, or require the carrying out, of the provisions of this contract, upon his behalf, in case of his consent, absence, inability, or death"; that all property standing in the name of Joseph Charles Dean at the time of marriage is to remain in his name during his lifetime and no division of same is to be made during his lifetime, he to remain in complete charge of same; that in case of divorce said property shall become as it was before the signing of the contract, and that property gained solely through the joint endeavor of husband and wife, over and above said $48,960, should be divided equally between husband and wife and Marie Katherine Dean, each receiving one-third, "and all such divisions or other such provisions herein shall be made and carried out by the said Joseph Charles Dean, if living, as by a trustee, and if he be dead then by the said Marie Katherine Dean"; that all property belonging to Mary Kahanek at the time of marriage shall remain hers alone forever; "that in case of the death of the said Marie Katherine Dean *all interest of hers in the property hereinbefore set out in detail or that may accrue therefrom, or the value thereof,* will revert to the said Joseph Charles Dean"; that in the case of the death of Joseph Charles Dean, before divorce and without children, "all interest of his" in the property or accruals therefrom will revert to Marie Katherine and Mary Kahanek (Dean) equally; that in case of the death of Mary Kahanek all property of hers which she had before marriage should go to her heirs and all property acquired by her during marriage should revert to Joseph Charles Dean, if living, otherwise to Marie Katherine Dean, unless there were direct blood descendants of said husband and wife to whom it

may go; "and in no way is the said property or any part thereof to be bequeathed away from the said Marie Katherine Dean or the said Joseph Charles Dean"; further provisions, not here material, are made pertaining to the contingency of divorce or separation, and life insurance policies.

As above stated, the will dated December 9, 1922, devised one-half of all property owned by deceased at his death to Marie Katherine Dean and the other half to Mary Dean, and attached a copy of said antenuptial contract to said will and incorporated said contract as a part and parcel thereof.

The evidence of defendants consisted of the introduction of the will of said deceased dated May 3, 1938, the certificate of probate and order admitting same to probate, and three deeds, one dated in 1911 showing that J. C. Dean was the grantee of certain property located in Shawnee, one dated in 1935 and one in 1940 showing that J. C. Dean and Mary Dean, husband and wife, were the grantees of two pieces of real property located in Oklahoma County.

Mary Dean, executrix, and her four children have filed separate petitions in error and separate briefs, urging separate and different assignments of error; both of said briefs set forth numerous and lengthy propositions. Mary Dean, executrix, however, asserted in the court below and asserts here in her brief that she as executrix is the only necessary party in this action; that her four children, although they may be proper parties, are, and would be whether parties or not, bound by any judgment against Mary Dean as executrix of the estate of Joseph Charles Dean, deceased. Despite the contentions of the four children to the contrary, this is correct 58 O.S. 1951, Sec. 252; *Jameson* v. *Goodwin, et al.*, 43 Okl. 154, 141 P. 767; *Treese, Adm's.* v. *Spurrier Lumber Co. et al.*, 115 Okl. 188, 242 P. 235; *United States* v. *Sands, et al.* (10th Circuit, Okla.) 94 F.2d 156; *Bailey, et al.*

v. *Wood,* 183 Okl. 450, 83 P.2d 180; *Hopper* v. *Rowntree,* 275 P.2d 285.

The executrix, as do the four children, first contend that the court erred in refusing to grant their request for a jury trial. This is an equitable action, triable to the court, and the court did not err in refusing a jury trial. *Allen* v. *Jones,* 188 Okl. 546, 110 P. 2d 911.

All appealing parties protest the competency of plaintiff as a witness under 12 O.S. 1951, Sec. 384, the so-called "dead man" statute, and the introduction of plaintiff's deposition in evidence.

The record discloses that on September 23, 1955, after a general appearance had been entered on behalf of all defendants by their two attorneys, said attorneys took plaintiff's deposition, at which time they elicited from plaintiff, in response to questions propounded by them, answers concerning transactions with her deceased father. Thereafter in January, 1956, the four children hired separate counsel, who called the attention of the court to the fact that one of the children, John Dean, was still a minor and had a guardian *ad litem* appointed for him, and thereafter these attorneys filed various additional motions, demurrers and answers on behalf of all four children. Upon plaintiff being called as a witness, both the attorneys for the executrix and the attorneys for the four children objected to her competency. The deposition was introduced and the questions and answers read therefrom to show waiver by defendants of the "dead man" statute, and the court allowed it to be introduced for this purpose over the strenuous objections of defendants, but the court refused to allow plaintiff to go any further in testifying than the questions asked her by defendants in said deposition; after the questions and answers, one by one, had been read for this purpose, and plaintiff had testified that those were the questions asked her by defendants and that she had made those

answers, plaintiff offered to testify that if the same questions were asked her at that time she would make the same answers, but the trial judge held that such evidence would be merely repetition, inasmuch as she had already gone over all of them on the witness stand, and allowed the deposition in evidence for all purposes.

The executrix contends that this action on the part of the trial judge was error because the witness was present in person to testify and therefore it was error to admit her deposition; as shown above, the trial judge decided that inasmuch as plaintiff had already testified that those questions were asked her and that she made those answers, that it would be merely repetition to go over them all again, especially as the trial judge was limiting the waiver of the statute by defendants to the specific questions asked her by them. There was no abuse of discretion on this point, nor any prejudice. The incompetency of a party to testify imposed under the statute, supra, is waived by the taking of such party's deposition, whether the deposition was ever completed and filed in court or not, where in the taking of such deposition the party is required to testify concerning transactions with the deceased person from whom he acquired his cause of action. *Cox* v. *Gettys*, 53 Okl. 58, 156 P. 892; *Trent* v. *Trent*, 270 P. 2d 953; *Jent, et al.* v. *Brown*, 280 P.2d 1005. The contention made by the four children that they are not bound by such waiver is not tenable; they do not deny that the attorneys who took the deposition did not represent them at the time same was taken, nor do they disaffirm the general appearance entered on their behalf by said attorneys; the employment of new counsel at a later date cannot serve to erase the actions of former counsel.

All appealing parties contend that plaintiff's evidence was insufficient to show her ownership of an undivided one-half interest in the property standing in the name of Joseph Charles Dean at the time the antenuptial contract was entered into. They assert that plaintiff had to deraign

her title, and show by proper instruments her ownership as claimed by her, either by deeds, or by probate proceedings in her mother's estate. Plaintiff does not claim to have legal title to the property, which she would have, had deeds been made to her or had probate proceedings distributed an interest in her mother's estate to her. She claims equitable title, through an agreement with her father in the nature of a family settlement, and that this agreement and her ownership of such interest and the fact that her father held such interest in trust for her during his lifetime is evidenced by the antenuptial contract and the will made in conformity therewith. It is immaterial how she acquired ownership if her father acknowledged that she did have such ownership, and that he held legal title thereto in trust for her during his lifetime, she to have full enjoyment thereof at his death. The evidence, and the contract itself, clearly shows that Joseph Charles Dean acknowledged and recognized that Marie Katherine Dean did have ownership of an interest in the property standing in his name at the time of his marriage to Mary Kahanek, and that she would also own a one-half interest in the accumulations and increase therefrom. No other logical interpretation can be placed upon the wording of the contract. By the execution of the contract, Mary Kahanek, now Dean, also knew and recognized Marie Katherine's ownership in said property and the trust relation between her intended husband, Joseph Charles Dean, and his daughter, Marie Katherine. The judgment of the trial court on this point is not clearly against the weight of the evidence.

Appellants further contend that even if plaintiff did own an equitable interest in the property at the time of the marriage of her father and Mary Kahanek she has lost or become barred from asserting same because (1) her father and Mary Dean rescinded the antenuptial contract, and the instruments rescinding same were attached to defendants' answers; that plaintiff filed no reply, and there-

fore admitted that the antenuptial contract and will made in conformity therewith was cancelled; (2) that she knew of such rescission and took no steps to enforce her rights within applicable limitation statutes; that the recording of deeds to property taken by her father in his and Mary Dean's name jointly was at least constructive notice to plaintiff of such rescission; (3) that the antenuptial contract, being made expressly for her benefit, could only be enforced by her prior to the time that the parties thereto rescinded same, under 15 O.S. 1951, Sec. 29.

As to the first contention, the affirmative allegations of defendants' answers do not amount to new matter. They merely affirmatively deny the allegations of plaintiff's verified petition. All of the affirmative allegations of defendants' answers could have been proved under a general denial; plaintiff alleged the attempted cancellation of the contract; defendants attached to their answers the instruments by which the attempted cancellation was made; plaintiff alleged she was part owner of the furniture store and worked therein as a manager; defendants alleged she was only a salaried employee and had no other interest. A reply was not necessary. *Cox* v. *Gettys*, 53 Okl. 58, 156 P. 892; *Stephens* v. *Conley*, 48 Mont. 352, 138 P. 189; 41 Am. Jur. Pleadings, Sections 156, 174-175.

Such allegations as made by defendants did not constitute a complete defense to plaintiff's cause of action. The attempted cancellation of the antenuptial contract and contractual features of the will made in conformity therewith could in no way affect the interest of plaintiff unless she consented thereto. The contract was not one made merely for her benefit; she was actually a party thereto, as shown by the recital of consideration flowing to and from her, specific provisions as to the disposition of her interest in the property in event of her death prior to her father's, and the stipulation that no division of the property was to be made during her father's lifetime. The fact that a copy

of the contract was delivered to her is also strong evidence of this point. Under these facts 15 O.S. 1951, Sec. 29, can have no application. As between themselves, and as affecting their own interests, Joseph Charles Dean and Mary Dean could cancel and set aside antenuptial contract, but they could not rescind, abrogate, or cancel either the antenuptial contract or the contractual features of the will in conformity therewith insofar as same affected the rights of Marie Katherine without her consent. See *In re Greenleaf's Estate*, 169 Kan. 22, 217 P. 2d 275; *Haggerman* v. *Haggerman*, 160 Kan. 742, 165 P.2d 431, wherein a widow executed a will in conformity with a family settlement agreement; she thereafter attempted to rescind the family settlement agreement and executed a new will devising the property in a different manner and to different parties; held, while her revocation of her will made it impossible to probate it as such, it did not abrogate the family settlement contract in consideration of which it was made, and the attempted rescission of the family settlement agreement was ineffective against those parties thereto who had not consented to such attempted rescission. See also *Nelson* v. *Schoonover, et al.*, 89 Kan. 388, 131 P. 147.

Courts look with favor upon family settlement agreements, as a matter of public policy, and they will ordinarily be upheld when made with full understanding of the facts and without fraud, undue influence, or imposition, and this is true even though it might afterward appear that one or more of the parties to such contract actually had no enforceable right. *Vinson* v. *Cook*, 76 Okl. 46, 184 P. 97; *Scott* v. *Beams* (10th Circuit, Okla.) 122 F. 2d 777. No fraud, undue influence, or imposition is asserted or proved in this case.

Plaintiff alleged and proved that she did not know of the attempted rescission and disavowal of the trust relationship between her and her father as to her interest in the property until after her father's death. The attorney

for the executrix offered to stipulate in open court that plaintiff did not have knowledge of the cancellation of the antenuptial contract and will made in conformity therewith; even though the stipulation was rejected by the judge because of the objection thereto by the attorneys for the four children, same constituted an admission by counsel during trial; such admissions are a high specie of evidence and cannot be retracted. *Oklahoma Natural Gas Co.* v. *Walker*, 269 P. 2d 327. The purchase of two pieces of real property by plaintiff's father in his and his wife's name jointly could not be either constructive or actual notice to plaintiff of her father's repudiation of his trust, so as to start the statutes of limitation running. Her father had ample funds of his own, as plaintiff knew, and the mere purchase of this property in that manner, without more, was not notice that her father was repudiating the trust as to the one-half interest plaintiff owned in the original property and increase therefrom.

Where one obtains or retains legal title or right to property under circumstances which render it unconscionable for the holder of the legal title to retain it and enjoy the beneficial interest, equity will impress a constructive trust on the property so acquired in favor of the party who is equitably entitled to same. *Teuscher* v. *Gragg*, 136 Okl. 129, 276 P. 753; *Hayden* v. *Dannenberg*, 42 Okl. 776, 143 P. 859; *Renegar* v. *Brunning*, 190 Okl. 340, 123 P. 2d 686; *Ransdel* v. *Moore*, (Ind.) 53 N.E. 767.

The judgment of the trial court reserved to the executrix the right to show by proper pleading and evidence that any or all of the property standing in the name of the deceased at his death was not either the original property, subject of the contract and the trust there created, or the increase or accumulations therefrom and therefore not subject to plaintiff's claim of one-half ownership. Such judgment and decree is in accord with our decision in *Warden*

v. *Richardson*, 203 Okl. 474, 223 P.2d 338. All rights of the executrix and the estate are thereby protected. If any of the property in her hands is not properly subject to the judgment of the court, as not being the original property or its increase or conversion, the executrix may so show upon accounting.

Judgment affirmed.

Welch, C.J., Davison, Johnson, Jackson and Carlile, JJ., Concur. Halley, Williams and Blackbird, JJ., dissent.

Filed
In Supreme Court
of Oklahoma
Jun 25, 1957

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MARY DEAN, Individually, and as Executrix ET AL., Plaintiffs in Error,	)	
vs.	)	No. 37,466
MARIE KATHERINE JELSMA, nee Dean, Defendant in Error.	)	

HALLEY, J., dissenting:

The majority opinion here so misconstrues the facts and law in this case I am compelled to dissent.

This is not an involved case as far as the facts are concerned. Joseph Charles Dean married Julia Finnegan on the 11th day of October, 1899, at Louisville, Kentucky. Of this marriage one child, Marie Katherine Dean, now Jelsma, was born on December 15, 1900. Soon after 1900 the family moved to Shawnee, Oklahoma, where Mr. & Mrs. Dean engaged in the bakery business. The Deans accumulated some property. On May 7, 1919, Julia Finnegan Dean died. She left no estate. In August of the same year, Mr.

Dean with his daughter moved to Oklahoma City and lived at 627 East Park Place. Marie Katherine Dean continued to live at this address until April, 1924, when she was married to Henry Jelsma and moved to another address.

On October 27, 1922, J. C. Dean in contemplation of marriage to Mary Kahanek, entered into an ante-nuptial agreement with Mary Kahanek. Marie Katherine Dean, now Jelsma, while a contingent beneficiary under this agreement, was not a party to it and did not sign it.

Mary Kahanek and J. C. Dean were married as contemplated and on December 9, 1922, J. C. Dean made and executed a will in which he incorporated the ante-nuptial contract and cancelled all previous wills.

On November 17, 1929, J. C. Dean and Mary Kahanek after the birth of two sons both living, cancelled in writing the ante-nuptial agreement of October 27, 1922. On this same date J. C. Dean executed a new will cancelling all previous wills and ratified the agreement cancelling the ante nuptial agreement. Thereafter on May 3, 1938, after two more children, a boy and girl, had been born to J. C. Dean and Mary Kahanek Dean, J. C. Dean executed a new will in which he recognized all five of his children. On May 28, 1954, J. C. Dean died at the age of 87 years.

Plaintiff sued her step mother individually and as executrix of her father's estate and her three half-brothers and one half-sister for one-half of all property, real and personal, that her father owned at the time of his marriage to Mary Kahanek and one-half of all increase thereof. The trial court rendered judgment for the plaintiff which gave her one-half interest in all property shown in the ante-nuptial agreement and all increase that might be traceable to it.

The evidence fails to disclose that plaintiff's mother had any property in her name at her death. Everything was in

the father's name. It was never necessary for any of the property that J. C. Dean had at the death of plaintiff's mother to go through the probate court as the property of his wife. It was all his to do with as he pleased.

It is true that the father, J. C. Dean made an ante-nuptial agreement with Mary Kahanek in which plaintiff was mentioned. It is well settled that a marriage settlement or ante-nuptial agreement may be revoked by the consent of the parties which was done in this case. For the right to revoke see 41 C.J.S., Husband and Wife, Section 109 and 26 Am. Jur., Husband and Wife, Section 302. The Kansas cases relied upon by the majority to the effect that J. C. Dean and Mary Kahanek Dean could not revoke the ante-nuptial agreement as to Marie Jelsma do not sustain their position. *Hagerman* v. *Hagerman,* 160 Kan. 742, 165 P.2d 431, involved an agreement entered into by a married man with his mother and had nothing to do with an ante-nuptial agreement. *In re Greenleaf's Estate,* 169 Kan. 22, 217 P.2d 275, was a case where a widower, a grown daughter of his and his prospective second wife entered into an ante-nuptial agreement signed by the three, an element that does not exist in the case at bar. This case recognizes the right of the parties to ante-nuptial agreements to revoke the same. More especially would this be true where the ante-nuptial agreement itself contemplates such a possibility and certainly Marie Jelsma did not take as a purchaser in this case.

J. C. Dean at no time placed his property under the control of Marie Katherine. He at no time recognized that she had any right in the property that he owned at his first wife's death. He never at any time placed his property beyond his control and specifically provided that the property should be returned to him if he and Mary Kahanek were to separate. Any right that Marie Katherine got from the ante-nuptial agreement was purely contingent upon the happening of certain events which never happened

prior to its revocation. Marie Katherine was never a party or a necessary party to the agreement between J. C. Dean and Mary Kahanek and it was not a family settlement.

Marie Katherine contends that she did not know of the revocation of the ante-nuptial agreement. She was not entitled to know of it. As far as she was concerned it was nothing more than a will and could be revoked at any time by the parties to it. She had expended nothing in order to be mentioned in the agreement.

The terms of the ante-nuptial agreement provided that in case the parties had children provision would be made for them as provided by law or will, which is made plain in this paragraph of the agreement:

> "That if there are any direct blood descendants, heirs of the said husband and wife, inheriting through both of them jointly, said heirs shall share first as provided for them by law or will made by the said Joseph Charles Dean at any time, and then the property remaining shall be disposed of in accordance with all the provisions and purposes of this contract and the said will; and of the said will and the said contract the said will shall prevail."

It clearly showed that plaintiff was not to take one-half of the property owned by J. C. Dean at the time of the death of his first wife.

I submit that no irrevocable trust was ever created for plaintiff. The only interest that the plaintiff could have in the property her father had in his name when her mother died would have been a one-fourth of the entire estate as certainly her mother would have had but a half of the estate if it was jointly acquired and in the name of both father and mother. Certainly the husband would have received half of her estate on her death. But here the entire accumulations of J. C. Dean and his first wife were in J. C. Dean.

When he married Mary Kahanek everything he owned at the first wife's death was in his name. It continued to be his property. Marie Katherine Jelsma was not deeded any of the property. Neither was the ownership of any personal property in the name of the first wife.

In the case of *Jones et al.* v. *Farris*, 180 Okl. 341, 69 P.2d 344, we held as follows:

> "Where property jointly acquired during coverture is of record in the name of the husband, no question of resulting trust being involved and the husband is still living, and the wife has taken no steps to determine her interest therein, it is not such a vested interest in her as will descend to her children upon her death intestate during the lifetime of her husband, so as to reduce his interest therein."

This case was tried as one of equitable cognizance. In such case it is our duty to weigh the evidence and render that judgment that should have been rendered. It is impossible for me to see under the evidence how any Chancellor would give one child a lion's share as was done in this case. It is plain that all the property appearing in J. C. Dean's name at his first wife's death was his and the only possible claim Marie Katherine Jelsma could assert to the property must be by the ante-nuptial agreement.

There is nothing in the ante-nuptial agreement that indicates in any way that J. C. Dean considered that Marie Katherine owned any interest in the property when the agreement was executed.

I have read the record and there is no evidence shown that would sustain the conclusion of facts and law that the trial court entered in this case. The only evidence that plaintiff had was her own made by deposition and the man from whom J. C. Dean purchased the Capitol Furniture Company and a friend who lived neighbors to the plaintiff

and her father before plaintiff's marriage. The plaintiff testified that her mother told her "that what was hers was mine." I submit that this is no evidence that the half of the property that stood in the name of J. C. Dean belonged to his first wife. Neither is there any evidence that Marie and her father entered into a family agreement, the statement in the majority opinion to the contrary notwithstanding.

At no time did J. C. Dean acknowledge that any property belonged to Marie. He was said to have stated that she had a store which could only mean that it would go to her if he died. This whole picture changed when he married the second time.

The demurrer to the evidence by defendants or motion for judgment by the defendants should have been sustained as there is no evidence that would sustain the judgment rendered by the trial court in this case. I dissent.

I am authorized to state Justice Blackbird concurs in the views expressed herein.

[APPENDIX]

JUDGMENT OF TRIAL COURT

Decree
Filed: Mar. 22, 1956
Book 566, page 193

Filed
IN DISTRICT COURT
Oklahoma County,
Okla.
Jul 16, 1956
DALE SMITH, COURT
CLERK
BY Bryan Mitchell
Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

MARIE KATHERINE JELSMA, nee Dean, Plaintiff,	)	
vs.	)	No. 133,879
MARY DEAN, JOSEPH DEAN, THOMAS DEAN, PATRICIA CATRON, nee Dean, JOHN DEAN, and MARY DEAN, Executrix of the Estate of Joseph Charles Dean, Deceased; Defendants.	)	

DECREE

This cause coming on to be heard this 17th day of February, 1956, and plaintiff appearing in person and by her attorneys of record, Charles Hill Johns and O. A. Cargill, and defendant, Mary Dean, executrix of the Estate of Joseph Charles Dean, deceased, and individually appearing by her attorneys of record, Charles D. Scales and Lee Gill, and defendants, Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, appearing by her attorneys of record, Charles D. Scales, Lee Gill and John Eberle, and defendant,

John Dean, appearing by Richard J. Spooner, guardian *ad litem*, and by his attorneys of record, John Eberle and Richard J. Spooner, and plaintiff having announced ready for trial, and after demand for jury trial of defendants having been denied, announced ready for trial, and defendants having requested Findings of Fact and Conclusions of Law, thereupon the Court proceeded to hear the evidence of plaintiff, and defendants, and thereupon, both sides having rested, the Court took said cause under advisement.

And upon the 5th day of March, 1956, the Court advised all of parties to this cause of the proposed findings of fact and conclusions of law of the Court, and set this cause for further hearing upon the 22nd day of March, 1956, at 9:00 A.M.

And now upon the 22nd day of March, 1956, at 9:00 A.M., this cause comes on for further hearing and all of the parties being present in Court by their respective attorneys of record, and the Court being fully advised in the premises does in open Court make the following Findings of Fact and Conclusions of Law, and render the following judgment and decree:

Findings of Fact

The Court finds by a preponderance of the evidence:

1. That Joseph Charles Dean during his lifetime entered into a valid ante-nuptial contract with Mary Kahanek dated October 27, 1922; that subsequently, Joseph Charles Dean and Mary Kahanek were married; that after said marriage, Joseph Charles Dean made, executed and published a Will and Testament upon December 9, 1922, whereby the said ante-nuptial agreement was made a part and parcel of said Will and Testament.

2. That said ante-nuptial contract dated October 27, 1922, was in part for the benefit of the daughter of Joseph Charles Dean, to-wit, Marie Katherine Dean (now Jelsma),

plaintiff herein, and the said ante-nuptial contract, and the contractual provisions of the Will and Testament of December 9, 1922, were in full force and effect upon the date of the death of Joseph Charles Dean insofar as plaintiff is concerned.

3. That from the evidence introduced in this cause, both parol and documentary, and the legal presumptions therefrom, which have not been rebutted by any evidence whatsoever on the part of defendants, or any of them, the said Marie Katherine Dean Jelsma, plaintiff herein was the owner of an undivided one-half (½) interest in all of the property and assets, real, personal and mixed, described and set forth in said ante-nuptial contract of October 27, 1922; further, that plaintiff is the owner of an undivided one-half (½) interest in all of the profits, accumulations, conversions and increase arising from and traceable to the profits and accumulations from the ownership of said property described in the contract of October 27, 1922.

4. That defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, holds legal title to said property and said profits, accumulations, conversions and increase therefrom in trust and for the benefit of plaintiff, Marie Katherine Dean Jelsma, to the extent of an undivided one-half (½) interest therein and thereto.

5. That plaintiff, Marie Katherine Dean, is entitled legally to a full and complete accounting as prayed for in her petition.

6. The Court finds that plaintiff by evidence established all the material allegations of her petition and defendants introduced no evidence whatsoever to rebut, contradict or deny such evidence and proof introduced by plaintiff.

Conclusions of Law

The Court, therefore, concludes as a matter of law:

1. That upon and after the execution and delivery of said ante-nuptial agreement of October 27, 1922, the plaintiff, Marie Katherine Dean (now Jelsma) was the owner of the equitable title to an undivided one-half (½) interest in and to all of the property, real, personal and mixed, set forth and described in said contract of October 27, 1922.

2. That the Will and Testament of Joseph Charles Dean of December 9, 1922, was both testamentary and contractual.

3. That upon the date of the death of Joseph Charles Dean, plaintiff, Marie Katherine Dean Jelsma was the owner of the equitable title to an undivided one-half (½) interest in and to all of the property, real, personal and mixed, described in said contract of October 27, 1922, standing in the name of the said Joseph Charles Dean upon the date of his death and demise; further and in addition thereto, plaintiff, Marie Katherine Dean Jelsma, was the owner of the equitable title to an undivided one-half (½) interest in all of the property, real, personal and mixed, standing in the name of Joseph Charles Dean upon the date of his death and demise which is traceable to and from the accumulations, profits, conversions and increase from the said property and assets described in said contract of October 27, 1922.

4. That defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, holds the legal title of said undivided one-half (½) interest in said property, including accumulations, profits, conversions and increase therefrom in trust for the exclusive use and benefit of plaintiff, Marie Katherine Dean Jelsma.

5. That plaintiff, Marie Katherine Dean Jelsma, is entitled to a full and complete accounting by defendant,

Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, as prayed for in the petition of plaintiff.

6. That plaintiff is entitled to all of the relief prayed for in her petition the same to be evidenced by a formal decree and judgment of this Court.

Exceptions to the Findings of Fact and Conclusions of Law allowed to all defendants.

JUDGMENT AND DECREE

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT that plaintiff is the owner of an undivided one-half (½) interest in and to all of the property, real, personal and mixed standing in the name of Joseph Charles Dean, now deceased, as of October 27, 1922, which said property was and is described as follows:

Two-story brick building at 216 West Main Street, Shawnee, Oklahoma, (Lot 14, Block 16, Choctaw Addition to Shawnee, Oklahoma)
Residence at 627 East Park Place, Oklahoma City, (Lots 20 and 21, Block 20, Howe's Capitol Addition to Oklahoma City, Oklahoma, with all appurtenances and improvements)
Furniture and fixtures in said residence
Five-passenger automobile, Dodge
Cash and bills receivable
Stock in furniture store at 219 West California Avenue, Oklahoma City, Oklahoma, called the Capitol Furniture Company.
Bills receivable on Capitol Furniture Company accounts and notes.
War Savings Stamps
Liberty Bonds
Mortgage notes on real estate

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT that plaintiff is the owner of an undivided one-half (½) interest in and to all of the property, real, personal and mixed, including money, standing in the name of Joseph Charles Dean, wholly or in part, upon the date of the death and demise of Joseph Charles Dean, which is traceable to and from the accumulations, profits, conversions and increase from the said property and assets owned by plaintiff and the said Joseph Charles Dean upon October 27, 1922, and described above.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the said Joseph Charles Dean, during his lifetime, and defendant Mary Dean, as Executrix of the Estate of Joseph Charles Dean, deceased, have held, since October 27, 1922, and now hold title to an undivided one-half (½) interest in and to all of said property, including a like interest in all the accumulations, profits, conversions and increase therefrom, in trust for the exclusive benefit of plaintiff Marie Katherine Jelsma who is the owner of said undivided one-half (½) interest.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, within thirty (30) days from March 22, 1956, make, execute and deliver to plaintiff Marie Katherine Jelsma good and sufficient deeds and bills of sale to an undivided one-half (½) interest in and to all of the property and assets, real, personal and mixed, the legal title to which stood in the name of Joseph Charles Dean, either in whole or in part, upon the date of the death of Joseph Charles Dean; further, defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, pay to plaintiff Marie Katherine Jelsma one-half (½) of all of the money standing in the name of Joseph Charles Dean upon the date of his death and one-half (½) of all the money collected by de-

fendant Mary Dean as Executrix of the Estate of Joseph Charles Dean, deceased, after the date of his death; Further, that the defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, shall within thirty (30) days from March 22, 1956, make a full and complete accounting to plaintiff in accordance with this Decree; Further, if said defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, desires to show cause, if any there be, that any of the assets of the Estate of Joseph Charles Dean, deceased, are not, in fact, either the property and assets, owned by plaintiff and deceased, Joseph Charles Dean, upon October 27, 1922, or the accumulations, profits, conversions and increase therefrom, as herein adjudicated, then the said defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, shall file in this cause, by appropriate pleading, any such claim, if any there be within thirty (30) days from March 22, 1956; Further, plaintiff shall have thirty (30) days from the date of the filing of such accounting and/or other pleading of defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, within which to take issue therewith, and any issue of fact thereupon to be determined by the Court upon further hearing.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that if defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, fails to make, execute and deliver to plaintiff good and sufficient Conveyances and Bills of Sale to an undivided one-half (½) interest in and to all of the property and assets, real, personal and mixed, of the Estate of Joseph Charles Dean, deceased, and pay plaintiff one-half (½) of all of said money, as aforesaid, within thirty (30) days from March 22, 1956, and does not within said thirty (30) day period file in this cause an appropriate pleading setting forth allegations of fact showing that a portion of the assets of said Estate of Joseph Charles Dean, deceased, was not

either the accumulations, profits, conversions or increase of the property and assets standing in the name of Joseph Charles Dean upon October 27, 1922, then this Decree shall operate as a full and complete adjudication of title to an undivided one-half (½) interest in plaintiff Marie Katherine Jelsma in and to all of the property and assets, real, personal or mixed, standing in the name of Joseph Charles Dean upon the date of his death, described as follows, to-wit:

Lots 13 and 14, Block 60, Oklahoma City, Oklahoma, according to the Original Plat thereof;

Lot 9, Block 32, Oklahoma City, Oklahoma, according to the Original Plat thereof;

Lot 14, Block 33, Oklahoma City, Oklahoma, according to the Original Plat thereof;

Lot 11, Block 52, Oklahoma City, Oklahoma, according to the Original Plat thereof;

Lots 20 and 21, Block 20, Howe's Capitol Addition to Oklahoma City, Oklahoma;

Lot 10, Block 23, Park Place Addition to Oklahoma City, Oklahoma;

The East 50 feet of Lots 1, 2 and 3, Block 50, Maywood Addition to Oklahoma City, Oklahoma;

The West 40 feet of Lots 1, 2 and 3, Block 50, Maywood Addition to Oklahoma City, Oklahoma, and

the West 40 feet of Lots 1, 2, 3 and 4, Block 3, Military Addition to Oklahoma City, Oklahoma;

Lot 6 and the North 2.14 feet of Lot 7 of Block 2, Military Addition to Oklahoma City, Oklahoma;

South 2 and one-half acres of Block 9, Lincoln View Addition to Oklahoma City, Oklahoma, and an undivided one-half interest in the mineral

rights and royalties in and under the North 2 and one-half acres of Block 9 of Lincoln View Addition to Oklahoma City, Oklahoma;

Furniture business, stock of merchandise, bank accounts, accounts receivable and other assets of said business operated as Capitol Furniture Company located at 227 West California Avenue, Oklahoma City, Oklahoma;

All bank accounts in the Fidelity National Bank of Oklahoma City, Oklahoma in the name of J. C. Dean and/or Capitol Furniture Company;

Stocks, bonds and investment insurance policies including 100 shares of stock in Sunray Oil Company and 100 shares of stock in Cuba Company, and other personal property, the exact description unknown;

Various mortgages and mortgage notes, including mortgages from George E. Bailey, R. A. Parker, A. H. Parker, E. T. Gidding and Exie Lockhart;

Lot 10, Block 32, Oklahoma City, Oklahoma, according to the Original Plat thereof.

Undivided one-half (½) interest in the Northwest quarter (NW¼) of the Northwest Quarter (NW¼) of Section 30, Township 8 N, Range 4 E, Pottawatomie County, Oklahoma.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that defendants Mary Dean, Executrix of the Estate of Joseph Charles Dean, Deceased, Mary Dean, nee Mary Kahanek, individually, and/or Joseph Dean, Thomas Dean, Patricia Catron, nee Dean and John Dean, have no right title or interest in and to any of the property, real, personal or mixed, herein adjudicated and decreed to plaintiff Marie Katherine Jelsma, to

which defendants and each of them except. Defendants are allowed exceptions to all Findings of Fact, Conclusions of Law and this Judgment and Decree.

/s/ Glen O. Morris
Judge of the District Court

FEDERAL QUESTIONS RAISED

The Federal Questions sought to be reviewed were raised in the following manner and method in the court and stage of the proceedings indicated and were passed upon as hereinafter set out.

Written Demand for a Jury Trial was filed in the trial court prior to the trial (Page 113 of Transcript) and which appears as follows:

"DEMAND FOR A JURY TRIAL

"Come now the defendants, Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, John Dean and Richard J. Spooner, Guardian *ad litem* of the defendant John Dean, a minor, and request and demand a trial by jury in the above cause.

/s/ "John F. Eberle."

and oral demand for a jury trial was made at the commencement of the trial (pages 117 to 125 of Transcript) which motion was overruled by the court (page 125 of Transcript) which motions and order the pertinent part of which appear as follows:

"Mr. Eberle: Come now the defendants Joseph Dean, Thomas Dean, Patricia Catron, John Dean and Richard J. Spooner, Guardian *ad Litem* of John Dean, a minor and requests and demands trial by jury in the above cause."

(Argument in support of motion omitted.)

"Mr. Scales: Comes now the defendants Mary Dean, Executrix of the Estate of Joseph Charles Dean, Deceased, and Mary Dean, individually, and renew their request and demand for jury trial for the reason that the plaintiff claims ownership of certain property, which is denied, and we feel that we are entitled to have a jury to try the issues as to the ownership of that property."

(Argument in support of motion omitted.)

"The Court: I think I understand pretty well the pleadings in this case. I think it is a question of equity, the establishment of a trust as alleged. It involves the interpretation of a contract. It is a legal matter. And so the motion for a jury trial will be denied and exceptions will be allowed.

Mr. Eberle: May we have an exception on behalf of each and all the defendants?

The Court: An exception is allowed on behalf of each and all the defendants."

Oral motions for judgment on the pleadings were made at the commencement of the trial (page 127 of Transcript) which motions were by the court overruled (page 127 of Transcript) and which motions and order appear as follows:

"Mr. Scales: Comes now the defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, Deceased, and moves the court to render judgment for the defendant for the reason that under the petition filed herein by the plaintiff and the answer filed by the defendant, the defendant is entitled to judgment for costs.

Mr. Gill: I take it that you make that motion for Mary Dean individually too?

Mr. Scales: That is right. I filed a separate answer for Mary Dean, individually, and I don't believe that I signed the answer and I ask leave at this time to sign it although I do not think it is really necessary.

The Court: All right, the request will be granted.

Mr. Eberle: On behalf of the defendants Joseph Dean, Thomas Dean, Patricia Catron, John Dean and Richard J. Spooner, Guardian *ad litem* of John Dean, a minor, I make and adopt the same motion just made by counsel for the administratrix.

The Court: All right, the motions will be overruled and exceptions will be allowed."

Oral denials of jurisdiction were made at the commencement of the trial (page 127 to 128 of Transcript) which motions were overruled by the court (page 128 of Transcript) and which motions and order appear as follows:

"Mr. Eberle: Come now the defendants Joseph Dean, Thomas Dean, Patricia Catron, John Dean and Richard J. Spooner, Guardian *ad Litem* of John Dean, a minor and deny the jurisdiction of the Court to try this cause and in support thereof state that this is an action for money and property brought against the administratrix of the estate, that the action is premature for the reason that no claim has been filed in said estate and the time has now passed for the filing of such claim and this particular action is barred by the statute.

The Court: Overruled.

Mr. Eberle: Exception."

Oral objections to the introduction of evidence were made at the commencement of the trial (pages 128 to 129 of Transcript) which motions were overruled by the court (page 129 of Transcript) and which objections and order appear as follows:

"Mr. Gill: Come now the defendants Mary Dean, Executrix, and Mary Dean, individually, and object to the introduction of any evidence in this case on the ground that the pleadings filed by the plaintiff are wholly insufficient to state any cause of action against these two defendants, and upon the further ground that, if any cause of action be stated therein, the same appears upon its face to be one subject only to adjudication by a probate court and one as to which this court has no jurisdiction.

Mr. Eberle: And on behalf of the defendants, Joseph Dean, Thomas Dean, Patricia Catron, John Dean and Richard J. Spooner, Guardian *ad Litem* of John Dean, a minor, we unite in the motion just made by Mr. Gill if the Court please.

The Court: All right. Motions overruled and exceptions are allowed.

Mr. Scales: We further object to the introduction of any evidence for the reason that the petition shows on its face that these defendants, if trustees at all, are only constructive trustees and not actual—I mean, involuntary trustees and not voluntary trustees, the voluntary trustee having deceded, and that more than fifteen years elapsed since repudiation of the same by the execution of the will of May 3, 1938, alleged and referred to in the petition, which discloses conclusively and as a matter of law that any cause of action she may have had has expired by the statute of limitations.

Mr. Gill: To make the record clear, that motion is advanced on behalf of both Mary Dean, Executrix and Mary Dean, individually.

Mr. Eberle: May we show the same on behalf of the defendants we represent?

The Court: All right. Overruled.

Mr. Eberle: We except to the ruling of the court.

The Court: Exception allowed each of the defendants."

The opening statement of plaintiff (respondent here) appears at pages 130 to 140 of the Transcript.

Oral motions for judgment on the pleadings and opening statement were made following the opening statement of plaintiff (page 141 of Transcript) which motions were overruled by the court (page 141 of Transcript) and which motions and order appear as follows:

"Mr. Scales: Before I make an opening statement, I would like to make a motion on behalf of the defendants. Comes now the defendant Mary Dean, Executrix of the Estate of Joseph Charles Dean, Deceased, and moves the Court for judgment on the pleadings and the opening statement of counsel for the reason that the pleadings show the defendants are entitled to judgment, and for the further reason that the plaintiff does not deraign her title to the real and personal property of which she says she was the owner in 1922 and counsel in his opening statement does not purport, or propose to produce any evidence of her ownership of title to that property and for the further reason that the will on which she relies of December 22, 1922, is, under her pleadings, which show that subsequent thereto four children were born to the deceased, invalid and unenforceable, for the reason that these children subsequently born are not mentioned therein.

Mr. Gill: If the Court please, before you rule on that, we would like to advance the same motion on behalf of Mary Dean, individually, without restating it.

Mr. Eberle: I adopt the motion made by counsel for Mary Dean, Executrix, on behalf of Joseph Dean, Thomas Dean, Patricia Catron and John Dean and Richard J. Spooner, Guardian *ad Litem* of John Dean, a Minor.

The Court: Each of the motions will be overruled and exceptions allowed."

Additional oral objections to jurisdiction were made following the opening statement of plaintiff (page 142 of Transcript) which objections were overruled by the court (page 142 of Transcript) and which objections and order appear as follows:

"Mr. Gill: If Your Honor please, in view of the opening statement of counsel on behalf of Mary Dean, as executrix and on behalf of Mary Dean, individually, we would like again to object to the jurisdiction of this court to try the issues which counsel says he is attempting to present here, for the reason that they are cognizable only by the County court.

The Court: Overruled and exception allowed.

Mr. Scales: Or a proper action in the District Court—that this is not the proper sort of action.

Mr. Gill: Before you rule, may we add to our motion: 'and not a proper action in the District Court, and we submit that this is not such an action.'

The Court: Overruled and exceptions allowed * * *."

Upon the trial of the case commencing the plaintiff (respondent here) was called as the first witness in her own behalf and the petitioners objected to the competency of the plaintiff to testify to transactions with the deceased in an action against the executrix and heirs of the said decedent (page 148 of Transcript) which objections of the said petitioners were by the court overruled (page 148 of

Transcript) and which objection and order appear as follows:

Q. "State your name, please, to the court.

A. Marie Katherine Jelsma.

Mr. Eberle: Come now Joseph Dean, Thomas Dean, Patricia Catron, and John Dean, and Richard J. Spooner, guardian *ad litem* of John Dean, a minor, and object to the competency of this witness to testify in this matter, and in support thereof state that she brings this action against the executrix of the Estate of Joseph Charles Dean, Deceased, and against the heirs of such estate and is here for the purpose of testifying to transactions between the deceased and this party, Marie Katherine Jelsma.

Mr. Gill: Before you rule, if the Court please, Mary Dean, executrix, and Mary Dean, individually, adopt that motion for and on their behalf—adopt that objection, I should say instead of motion.

The Court: The objection will be overruled at this time because it is premature.

Mr. Eberle: Note our exception.

Mr. Gill: We except."

This objection to the competency of the plaintiff to testify was renewed throughout the proceedings and on each occasion the court overruled the objection.

Oral objections to the introduction of the deposition of respondent into evidence were made at the trial after respondent offered the same (pages 159 to 169 of Transcript) and over objections the deposition was admitted into evidence (page 168 of Transcript) which objections and order of the court appear as follows:

"Mr. Scales: Come now the defendants, Mary Dean, Executrix of the Estate of Joseph Charles Dean, De-

ceased, and Mary Dean, individually, and objects to the introduction of the deposition in evidence, first, for the reason that the witness is present in court and is now on the witness stand, and for the further reason that it is not the proper way to introduce depositions in the trial of a case.

Mr. Gill: May we add to those grounds, on behalf of the same two parties, that the exhibit is incompetent, irrelevant and immaterial; it is not within the issues; it is not the best evidence; it is hearsay; it is self-serving; it is leading and suggestive; it is a collateral attack upon the judgment I mentioned in the County Court, and it contains a lot of questions and answers that assume facts not shown by the evidence; no proper predicate has been laid for it; and it is not even properly identified.

* * * * * * * *

Mr. Gill: We are objecting to this as an exhibit. He is trying to get this deposition in evidence in this way, and I think it is incompetent on all the grounds I stated, and the additional grounds that Mr. Scales stated, and I object to it on behalf of Mary Dean, Executrix, and Mary Dean, individually, on those grounds.

Mr. Eberle: Come now Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, John Dean and Richard J. Spooner, guardian *ad litem* of John Dean, and object to the introduction of this deposition, and every part and parcel and every question and answer of it, and in support of said objection states that the questions and answers are incompetent, irrelevant and immaterial the witness being present in court, and further that this witness and her deposition, and all the questions and answers there made by her are made by her when she is an incompetent witness, it being an action by her

against the administratrix of the estate and the executrix of the estate and of the heirs, and she is incompetent to testify to any matters which involve, or may directly or indirectly involve, a transaction with the deceased person, if such they claim to be."

Following the objections of the petitioners, the court suggested that the deposition be offered in evidence, and the petitioners continued to make their objections, and the court admitted the deposition in evidence. The proceedings of the court (commencing at page 167 of the Transcript) appear as follows:

"The Court: * * * Do you now offer your exhibit in evidence?

* * * * * * * *

The Court: Exhibit No. 1, may be introduced and considered by the court in evidence and the question and answer—

Mr. Scales: The deposition?

The Court: The deposition will be considered by the court."

Whereupon the court having admitted the deposition into evidence the petitioners again raised their objections to the admission of the deposition or any part of the same into evidence. The proceedings (commencing at page 168 of the Transcript) appear as follows:

"Mr. Scales: We object to the court considering the deposition for any purpose, for the reason the witness is now on the stand and can answer the questions as this time, all questions propounded in these depositions.

Mr. Gill: On behalf of Mary Dean, Executrix, and Mary Dean, individually, we want to except to the court's ruling, and we want to move that that

answer be stricken which she gave, 'Yes, sir, I did', on each and all of the several grounds that we and Mr. John Eberle have recently presented in connection with the evidence that is now under consideration of the court and in connection with the deposition which was offered.

The Court: All right, it will be overruled.

Mr. Eberle: We would like to make the same objection on behalf of Joseph Dean, Thomas Dean, Patricia Catron and John Dean and Richard J. Spooner, guardian *ad litem* of John Dean, and ask that the answer be stricken and object to the ruling of the court admitting the deposition in evidence.

The Court: Exception will be allowed.

Mr. Eberle: Admitting the deposition in evidence, the entire deposition or any part thereof, on the ground that the witness is present and is able to testify, and, secondly, that this witness is now and was at the time of the taking of the deposition incompetent as a witness in this cause for the reason that the action is brought by her against the executrix of the estate and that she attempts or does testify to transactions between herself and the deceased, Joseph Charles Dean, and it is therefore invalid under what is commonly known as the 'dead-man' statute.

The Court: It will be overruled and exception allowed."

Commencing at page 312 of the Transcript the plaintiff (respondent here) rested and the petitioners made their respective demurrers to the evidence and motions for judgment which appear as follows:

"Mr. Gill: Comes now the defendant Mary Dean for herself personally and as executrix of the Estate

of Joseph Charles Dean, deceased, and demurs to the evidence offered by the plaintiff upon the ground that it does not prove and does not even attempt to prove any cause of action at all stated in the pleadings in this case against these two defendants whom I have named, or any cause of action whatever, irrespective of whether or not stated in the pleadings.

Mr. Scales: I want to add further that neither the petition or the evidence in this case show any oral or written contract, the terms of which are sufficiently definite and certain to enable the Court to ascertain what interest, if any, the plaintiff has in any of this property, or ever had, with reasonable certainty.

Mr. Eberle: Come now the defendants Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, John Dean and Richard J. Spooner, guardian *ad litem* of John Dean, a Minor, and demur to the evidence of the plaintiff herein, and in support of said demurrer state that the evidence of the plaintiff herein is insufficient to sustain the allegations of the petition, or the pleadings herein, and, secondly, that the evidence of the plaintiff and her witnesses are insufficient to sustain a judgment against these defendants I have just named.

Mr. Gill: Now, if Your Honor please, before you rule on the demurrer that I presented, may I incorporate in it all of the grounds which Mr. John Eberle has just stated in the demurrer which he has dictated into the record."

The order of the Court overruling the said demurrers appears at page 313 of the Transcript and is as follows:

"The Court: The demurrers will be overruled and exceptions will be allowed."

And at page 314 of the Transcript the respective petitioners moved the court for judgment, which motions were by the court overruled and exceptions were allowed. The proceedings of the court appear as follows:

> "Mr. Scales: In addition to the demurrers, I want to move for Judgment. Comes now the defendant Mary Dean, Executrix, and moves the Court to render judgment for the defendant for costs for the reason that the evidence of the plaintiff is insufficient, and for the further reason that the matters of defense are admitted by the plaintiff.
>
> Mr. Eberle: On behalf of Joseph Dean, Thomas Dean, Patricia Catron, John Dean and Richard J. Spooner, guardian *ad litem*; we adopt the motion and the statements just made by Mr. Scales, and make the same motion on behalf of these defendants.
>
> The Court: All right, each of the motions is overruled and exceptions are allowed."

At the close of all of the evidence, the petitioners again moved the court for judgment which motions of the petitioners were overruled, that the petitioners moved the court for judgment and submitted requested findings of fact and conclusions of law, which motions and findings were by the court overruled. The proceedings of the court appear commencing at page 369 of the Transcript as follows:

> "Mr. Scales: Comes now the defendant Mary Dean, Executrix, and Mary Dean, individually, and moves the court to state in writing conclusions of fact and conclusions of law, conclusions of facts to be found separately from conclusions of law; and moves the court to render judgment for the defendants; and now offers to the court Requested

Statement of Facts and Conclusions of Law, and asks the court to adopt them.

Mr. Eberle: At the conclusion of all the testimony, come now Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, John Dean and Richard J. Spooner, guardian *ad litem* of John Dean, a minor, and renew their demurrers and the separate demurrers of each and every one of the said named defendants, and at the close of all the testimony, each of the said defendants that I have just named moves the court for judgment in favor of said defendants and against the plaintiff, Marie Katherine Jelsma, and we have previously asked for Conclusions of Law and Statement of Facts, if the court please.

The Court: All right, the objections will be overruled and exceptions will be allowed to all defendants. Is there anything further?"

Oral objections were made by petitioners to the findings of fact and conclusions of law by the trial court (pages 403 to 404 of Transcript) and which appear as follows:

"Mr. Gill: If the Court please, we would like for the record to show at this time that the administratrix, Mary Dean, both for herself and as administratrix, and individually, objects and excepts to the findings of fact and conclusions of law which the court has just this moment announced that he is ordering filed today, which I am quite sure everybody understands is the same one that were mailed out, and by way of further explanation, I simply want this objection and exception to the findings of fact and conclusions of law, upon which the court relies and which the court is rendering, to get into the record after the announcement by the court that his findings of fact and conclusions of law are final and are rendered and after the

order that they be filed. Now, Your Honor, having just ordered them filed, I again state these objections and exceptions into the record and ask the court to rule on them, and if it be the Court's thought to overrule them, to allow an exception as to each of these defendants.

The Court: All right, the objection will be overruled and exceptions will be allowed.

Mr. Scales: I take it that the conclusions, since they have not been modified in any way, are made as of March 5th, the date they were mailed?

The Court: That is right.

Mr. Eberle: If the Court please, come now Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean and John Dean and Richard J. Spooner, guardian *ad litem* of John Dean, a minor, and now at this time again object and except to the findings of fact and conclusions of law found by the court and now filed at this time, and object and except to the judgment of the court. May we have that exception?

The Court: All right, the objection will be overruled and exception will be allowed."

Upon the signing of the journal entry of judgment by the trial Judge the petitioners objected and were each given an exception (page 406 of Transcript) as follows:

"The Court: All right, each and every defendant is given an exception."

Following the trial the petitioners filed their written Motions for a New Trial (pages 433 to 438 and 440 to 444 and 445 to 452 of the Transcript) which were overruled by the court (pages 453 to 454 of the Transcript) the pertinent part of which appears as follows:

"Comes now the defendant, Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, and moves the court to vacate and set aside the decision and judgment rendered herein on the 22nd day of March, 1956, defendant being aggrieved thereby, and to grant a new trial for the following causes which affect materially the substantial rights of said defendant:

"1. The court erred in admitting portions of depositions of plaintiff in evidence when plaintiff was present in court and on the witness stand.

"2. The court abused its discretion in allowing plaintiff to testify from depositions given by her prior to trial.

"3. The court was guilty of abuse of discretion by which defendant was prevented from having a fair trial.

"4. Irregularities in the proceedings of the court which prevented defendant from having a fair trial.

* * * * * * * *

"6. Irregularity in the order of the court in allowing plaintiff to read from questions and answers of her deposition when plaintiff was present in court.

"7. Irregularity in the order of the court in canceling stipulation entered into between the parties in open court for admission in evidence of originals of exhibits annexed to defendant's answer which were not denied by plaintiff by reply which prevented defendant from having a fair trial.

* * * * * * * *

"11. The decision is not sustained by sufficient evidence.

"12. There is no evidence to support the judgment declaring a trust, in that there is no evidence of any

consideration paid by plaintiff in the acquisition of the property standing in the name of Joseph Charles Dean at the time of his death and there was no evidence of any fraud or other misconduct on the part of deceased whereby he acquired title to the real estate or possession at his death or in his name jointly with others at his death from which a resulting or constructive trust might be impressed upon the same and the alleged trust was not established by clear, cogent, convincing or other evidence whatsoever.

"13. The decision is contrary to law.

"14. Error of law occurring at the trial and excepted to by defendant.

"15. Error of the court in overruling defendant's demand for jury trial.

* * * * * * * *

"19. Error of the court in overruling the demurrer of defendant to the evidence of plaintiff.

"20. Error of the court in overruling the motion of defendant for judgment on the pleadings and the evidence at the close of plaintiff's case for the reason that the answer of defendant which was admitted by plaintiff by failure to reply thereto, shows defendant is entitled to judgment.

* * * * * * * *

"25. The conclusions of fact found by the court are not sustained by sufficient evidence.

"26. The conclusions of fact found by the court are against the clear weight of the evidence.

"27. The conclusions of law found by the court are not applicable to the conclusions of fact found by the court.

"28. The court erred in adopting the conclusions of fact and conclusions of law submitted by plaintiff

for the reason that the same are not supported by the evidence and are contrary to law.

* * * * * * * *

"32. The court erred in overruling and denying the objections and exceptions of defendant to the findings of the court and in overruling the motion of defendant for judgment notwithstanding the findings.

* * * * * * * *

"35. The court erred in finding in its journal entry that plaintiff was the owner of an undivided one-half interest in the real and personal property set up on the journal entry when there was no evidence whatsoever to support the same.

* * * * * * * *

"Comes now the defendant, Mary Dean, and moves the court to vacate and set aside the decision and judgment rendered herein on th. 22nd day of March 1956 and to grant a new trial for the following causes which affect materially the substantial rights of said defendant:

"1. Irregularity in the proceedings of the court, plaintiff, orders of the court and abuse of discretion by which defendant was prevented from having a fair trial.

* * * * * * * *

"6. The decision is not sustained by sufficient evidence and is contrary to law.

* * * * * * * *

"8. Error of law occurring at the trial and excepted to by defendant.

* * * * * * * *

"10. Error of the court in refusing defendant's request for jury trial.

* * * * * * * *

"13. Error of the court in overruling the demurrer of defendant to the evidence of plaintiff.

"14. Error of the court in overruling the motion of defendant for judgment on the pleadings and the evidence at the close of plaintiff's case for the reason that the answer of defendant which was admitted by plaintiff by failure to reply shows defendant is entitled to judgment.

* * * * * * * *

"20. The findings of fact by the court are not sustained by the evidence, and are against the clear weight of the evidence.

"21. The conclusions of law found by the court are not applicable to the facts found or the evidence produced.

"22. Error of the court in determining and adjudicating there was a trust and that it is continuing, when the nature and substance of the alleged trust agreement and the corpus of the alleged trust and the alleged beneficial interests in the alleged trust were not established by clear, cogent or convincing evidence as required by law by reason of all of which defendant was prevented from having a fair trial.

* * * * * * * *

"26. The court erred in ordering this defendant to make any conveyance of any real estate in her name or in the name of the deceased or to divide any money or property held by this defendant.

* * * * * * * *

"29. The court erred in the absence of parol and documentary evidence in legally presuming plaintiff was entitled to judgment because the absence of parol and documentary evidence was not rebutted by defendant and the court abused its discretion in assuming in the absence of any evidence upon the issue that

plaintiff was the owner of an undivided one-half interest in any property in the name of her deceased father at his death.

* * * * * * * *

"Come now the defendants, Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, John Dean and Richard J. Spooner, guardian *ad litem* of John Dean, a minor, and move the Court to vacate and set aside the decision and judgment rendered herein on the 22nd day of March, 1956, defendants being aggrieved thereby, and to grant a new trial for the following causes which affect materially the substantial rights of said defendants:

"1. Irregularity in the proceedings of the Court, orders of the court, and abuse of discretion, by which the said defendants were prevented from having a fair trial.

* * * * * * * *

"5. That the decision and judgment are not sustained by sufficient evidence.

"6. That the decision and judgment are contrary to law.

"7. Error of law occurring at the trial, and excepted to by the said defendants.

* * * * * * * *

"9. Error of the Court in overruling the demand for jury trial of the said defendants.

* * * * * * * *

"17. Error of the court in admitting the deposition of the plaintiff in evidence.

* * * * * * * *

"25. Error of the Court in overruling the motion of the said defendants for a mistrial.

"26. Error of the Court in overruling the demurrer of said defendants to the evidence of the plaintiff.

"27. Error of the Court in overruling the motion of the said defendants for judgment on the pleadings and evidence at the close of plaintiff's evidence.

"28. Error of the Court in overruling the motion of the said defendants for judgment made at the close of all of the evidence.

* * * * * * * *

"40. That the conclusions of fact are not sustained by sufficient evidence.

"41. That the conclusions of law are contrary to law and are not based upon the evidence.

"42. That the conclusions of fact found by the Court are against the clear weight of the evidence.

* * * * * * * *

"49. That the Court erred in finding as a matter of law that upon the execution and delivery of the said ante-nuptial agreement that the plaintiff was the owner of the equitable title to an undivided one-half interest in the subject property.

"50. That the Court erred in finding as a matter of law that upon the death of Joseph Charles Dean, that the plaintiff was the owner of the equitable title to an undivided one-half interest in the subject property.

* * * * * * * *

"53. That the proceedings of the Court, the orders of the Court, and the decision and judgment of the Court are all in violation of the said defendants' constitutional rights under both the Constitution of the State of Oklahoma and the Constitution of the United States in that the said defendants are deprived of their property without due process of law, and in that the

said defendants are denied the equal protection of the laws."

The trial court made its written order overruling the motions for a new trial (pages 453 to 455 of Transcript) which appears as follows:

"On this 13th day of April, 1956, there came on for hearing the motion of Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, for new trial and the motion of Mary Dean for a new trial, and the joint motion of Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, John Dean for a new trial, plaintiff appearing by attorneys, Cargill and Johns and defendant, Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, and Mary Dean, appearing by their attorneys, Chas. D. Scales and Lee G. Gill, and defendants, Joseph Dean, Thomas Dean, Patricia Catron, *nee* Dean, and John Dean, appearing by their attorneys John Eberle and Richard J. Spooner, and the court having heard the arguments of counsel and being fully advised in the premises upon consideration finds that said motions for new trial and each of them should be overruled.

"IT IS, THEREFORE ORDERED AND ADJUDGED that the motions of defendants and each of them for new trial be and the same are hereby overruled; to which ruling of the court defendants and each of them then and there excepted, and each gave notice in open court of their and of his and her intentions to appeal to the Supreme Court of the State of Oklahoma.

"And said defendants and each of them praying an appeal to the Supreme Court and an extension of time within which to make and serve case-made on appeal, it is ordered that an extension of thirty days in addition to the time allowed by law or forty-five days from this date be granted said defendants and each of them in which to make and serve case-made, plaintiff

to have three days' notice in writing by either party. And said defendants and each of them having requested the court to prescribe the amount of the undertaking and to stay execution pending the giving of the same order to continue such stay pending the filing in the Supreme Court, it is ordered that execution be stayed pending the filing of this appeal, upon the giving of a good and sufficient bond in the sum of $10,000.00 within thirty days from this date."

Following the trial and judgment the petitioners perfected an appeal to the State Supreme Court and filed their written Petitions in Error (pages 1-A to 28-A of Transcript) the pertinent part of which appear as follows:

"The said Mary Dean, Joseph Dean, Thomas Dean, Patricia Catron *nee* Dean, John Dean, and Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, plaintiffs in error, complain of said defendant in error, Marie Katherine Jelsma *nee* Dean, at the January 1956 term of the District Court of Oklahoma County, State of Oklahoma, recovered a judgment, by the consideration of said court, against the said plaintiff in error, Mary Dean, Joseph Dean, Thomas Dean, Patricia Catron *nee* Dean, John Dean and Mary Dean, executrix of the estate of Joseph Charles Dean, deceased, in a certain action then pending in the said court wherein the said Marie Katherine Jelsma *nee* Dean, was plaintiff and Mary Dean, Joseph Dean, Thomas Dean, Patricia Catron *nee* Dean, John Dean and Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased were defendants. The original case-made duly signed, attested and filed is hereunto annexed as 'Exhibit A' and made a part of this petition in error; and the said Mary Dean, Joseph Dean, Thomas Dean, Patricia Catron *nee* Dean, John Dean and Mary Dean, Executrix of the estate of Joseph Charles Dean, deceased, plaintiffs in error aver that there is error in the said record and proceedings, in this, to-wit:

* * * * * * * *

"4. The court erred in denying defendants a jury trial.

* * * * * * * *

"8. The court erred in overruling the demurrers of defendants to the evidence of plaintiff.

"9. The court erred in overruling the motions of defendants for judgment on the pleadings and the evidence at the close of plaintiff's case, for the reason that the answer of defendant, which was admitted by plaintiff by failure to reply thereto, shows defendants are entitled to judgment, and the evidence, competent or otherwise, failed to supply the defects.

"10. The court erred in overruling the demurrers of defendants to the evidence of plaintiff, and motion for judgment for defendants.

"11. The court erred in admitting portions of depositions of plaintiff in evidence when plaintiff was present in court and on the witness stand.

* * * * * * * *

"13. The court was guilty of abuse of discretion and there were irregularities in the proceedings of the court and in the proceedings of plaintiff by which defendants in error were prevented from having a fair trial.

* * * * * * * *

"19. The decision is not sustained by sufficient evidence.

"20. The decision is contrary to law.

* * * * * * * * *

"23. The conclusions of fact found by the court are not sustained by sufficient evidence.

"24. The conclusions of fact found by the court are against the clear weight of the evidence.

"25. The conclusions of law found by the court are not applicable to the conclusions of fact found by the court.

"26. The court erred in adopting the conclusions of fact and conclusions of law submitted by plaintiff for the reason that the same are not supported by any evidence and are contrary to law.

* * * * * * * * *

"30. The court erred in overruling and denying the objections and exceptions of defendant to the findings of the court and in overruling the motion of defendant for judgment notwithstanding the findings.

* * * * * * * * *

"32. There is no evidence to support the judgment declaring a trust, in that there is no evidence of any consideration paid by plaintiff in the alleged acquisition of the property standing in the name of Joseph Charles Dean, deceased at the time of his death, and there was no evidence of any fraud or other misconduct on the part of decedent whereby he acquired title to the real estate or possession of the personal property or any part thereof standing in his name at his death or in his name jointly with others at his death from which a resulting or constructive trust might be impressed upon the same and the alleged trust was not established by clear, cogent, convincing or other evidence whatsoever.

* * * * * * * * *

"35. The court erred in refusing to consider the matters of defense, such as statute of limitations, estoppel, invalidity of alleged trust as in violation of statutes of uses and trusts, statute of frauds, laches, etc., pleaded by defendants, which were admitted by plaintiff by failure to reply.

* * * * * * * * *

"37. The court erred in finding that plaintiff had any interest whatsoever in the real estate in the name of Mary Dean when there was no evidence to support the finding.

"38. The court erred in refusing to consider the terms of the ante-nuptial contract relied on by plaintiff, which authorized decedent to make just such will or wills as he made November 17, 1929 and May 3, 1938, in event children were born to the marriage contemplated, and which provided that said will shall prevail over the ante-nuptial contract.

"39. The court erred in refusing to find as a conclusion of law that plaintiff was a third party beneficiary of the ante-nuptial contract, but was not a party to it, and that, by statute in Oklahoma, she had the right to enforce it until it was rescinded by the parties to it.

* * * * * * * * *

"41. Said court erred in overruling the motion of plaintiffs in error for a new trial.

* * * * * * * * *

"WHEREFORE plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught and that a judgment may be rendered in favor of plaintiffs in error and against defendant in error on the pleadings and the evidence, and that plaintiffs in error be restored to all rights that they have lost by the rendition of such judgment, and for such other relief as to the court may seem just."

* * * * * * * * *

"The said Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, and John Dean, plaintiffs in error, complain of said defendant in error, Marie Katherine Jelsma, nee Dean, for the reason that the said defendant in error, Marie Katherine Jelsma, nee Dean,

at the January 1956 term of the District Court of Oklahoma County, State of Oklahoma, recovered a judgment, by the consideration of said court, against the plaintiffs in error, Mary Dean, Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, John Dean and Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, in a certain action then pending in the said Court in case No. 133,879, wherein the said Marie Katherine Jelsma, nee Dean, was plaintiff, and Mary Dean, Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, John Dean, and Mary Dean, Executrix of the Estate of Joseph Charles Dean, deceased, were defendants. The original case-made, duly signed, attested, and filed, is hereunto attached, marked 'Exhibit A', and made a part of this petition in error, and the said Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, and John Dean, plaintiffs in error, aver that there is error in the said record and proceedings, in this, to-wit:

"1. Errors of law occurring at the trial and excepted to by these plaintiffs in error.

"2. That the court was guilty of abuse of discretion and there were irregularities in the proceedings of the court and in the proceedings of the defendant in error by which these plaintiffs in error were prevented from having a fair trial.

"3. That the said Court erred in overruling the demand for a jury trial of these plaintiffs in error.

* * * * * * * * *

"11. That the said Court erred in admitting the deposition of the defendant in error in evidence over the objection of these plaintiffs in error when the said defendant in error was present in Court and was testifying as a witness.

* * * * * * * * *

"16. That the said Court erred in overruling the motions for a mistrial as to the defendant, John Dean.

* * * * * * * * *

"22. That the said Court erred in overruling the demurrer to the evidence made by these plaintiffs in error at the close of defendant in error's evidence.

"23. That the said Court erred in overruling the motion of these plaintiffs in error for judgment made at the close of defendant in error's evidence.

* * * * * * * * *

"25. That the said Court erred in overruling the demurrer to the evidence of the defendant in error and motion of these plaintiffs in error for judgment made at the close of all of the evidence.

* * * * * * * * *

"27. That the said Court erred in making findings of fact and conclusions of law.

* * * * * * * * *

"29. That the decision and judgment of the Court are not sustained by sufficient evidence.

"30. That the decision and judgment of the Court are contrary to the evidence.

"31. That the decision and judgment of the Court are contrary to law.

"32. That the findings of facts by the Court are not sustained by sufficient evidence.

* * * * * * * * *

"34. That the findings of facts by the Court are contrary to the evidence.

"35. That the conclusions of law by the Court are not based upon or supported by the evidence.

"36. That the conclusions of law by the Court are not based upon the evidence and are contrary to the evidence.

"37. That the conclusions of law by the Court are erroneous and are contrary to law.

"38. That the said Court erred in overruling the motion of these plaintiffs in error for a new trial.

* * * * * * * * *

"56. That the Court erred in refusing to consider the terms of the ante-nuptial contract relied on by the defendant in error, which authorized decedent to make subsequent wills as the one on November 17, 1929, and the one on May 3, 1938, in event children were born of the contemplated marriage and which provided that such will shall prevail over the ante-nuptial contract.

"57. That the Court erred in refusing to find that the ante-nuptial agreement of October 27, 1922, was rescinded and cancelled by the parties thereto at the time of the making of the second and third wills by decedent, which fact was admitted by the pleadings.

"58. That the Court erred in refusing to consider as evidence the admissions and affirmative defenses set out in the answers of the plaintiffs in error which were admitted by the defendant in error by reason of the failure of the defendant in error to file a reply.

* * * * * * * * *

"61. That the Court erred in finding and adjudging in its journal entry of judgment that the defendant in error was the owner of an undivided one-half interest in the subject property and that the evidence was insufficient to support this finding of fact.

* * * * * * * * *

"63. That the Court erred in finding as a matter of law that upon the execution and delivery of the said ante-nuptial agreement that the defendant in error was the owner of the equitable title to an undivided one-half interest in the subject property.

* * * * * * * * *

"67. That the proceedings of the Court, the orders of the Court and the decision and judgment of the Court are all in violation of the said plaintiffs in error's constitutional rights under both the Constitution of the State of Oklahoma and the Constitution of the United States in that the said plaintiffs in error are deprived of their property without due process of law, and in that the said plaintiffs in error are denied the equal protection of the laws by action of the Court in failing to apply the law to the facts in the case at bar.

"WHEREFORE, said plaintiffs in error pray that the decision and judgment of the Court, so rendered, may be reversed, vacated, set aside, and held for naught, and that a judgment may be rendered in favor of these plaintiffs in error and against the said defendant in error, and that these plaintiffs in error be restored to all rights which they have lost by the rendition of such decision and judgment and for such other relief as to the Court may seem just and proper."

Thereafter the Supreme Court of the State of Oklahoma made and entered its opinion in the said case (*ante*) which affirmed the judgment of the trial court.

Following the entry of the opinion of the State Supreme Court, petitioners filed their written petitions for rehearing (pages 503 to 512 and 515 to 544 of Transcript) the pertinent parts of which appear as follows:

"Come now, Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, and John Dean, plaintiffs in error, and respectfully represent to the Court that on the

25th day of June, 1957, a decree and judgment was rendered by this Court in said cause Affirming the Judgment of the District Court of Oklahoma County wherein by virtue of the terms of an ante-nuptial contract the defendant in error was adjudged to be the owner of an undivided one-half interest in certain real and personal property, legal title to which had been in Joseph Charles Dean, now deceased, and declaring a trust thereon of such property in the hands of his executrix, and ordering conveyance thereof and an accounting.

"(1) That the decree and judgment of this Court overlooked certain terms and conditions of the said ante-nuptial contract, the consideration of which are vital to a proper determination of the interest acquired by the said defendant in error. The said ante-nuptial contract provided that in case the parties had children provision was made for them as provided by law or provision could be made for them by will notwithstanding any conflicting dispositions appearing in the said ante-nuptial contract. By the terms of the said ante-nuptial contract such provision for these children in a later will was to prevail over provisions in the contract. These terms which should be considered by this Court are as follows:

> 'That if there are any direct blood descendants, heirs of the said husband and wife, inheriting through both of them jointly, said heirs shall share first as provided for them by law or will made by the said Joseph Charles Dean at any time, and then the property remaining shall be disposed of in accordance with all the provisions and purposes of this contract and the said will; and of the said will and the said contract the said will shall prevail.'

These terms clearly show that any right which the plaintiff received by virtue of this ante-nuptial contract was subject to any subsequent disposition provided by law or made by will for direct blood descendants of the parties to the proposed marriage.

"(2) That the decree and judgment of this Court overlooked certain terms of the Last Will and Testament of Joseph Charles Dean, deceased, in which the decedent by will made disposition to the defendant in error, his wife and his direct blood descendants in accordance with the very terms of the said ante-nuptial contract. These terms are vital to a proper determination of the interest acquired by the said defendant in error and are as follows:

> 'Third—From the then remainder of my estate I give and devise to my said beloved wife, Mary Dean, one-third of all my property, real, personal, and mixed, and wheresoever situated; and in addition to said one-third, and not as a part thereof, I also give and devise to my said beloved wife, my homestead, being the real property in which my family and I are making our home at the time of my decease.
>
> 'Fourth—From the then remainder of my estate I give and devise to my beloved daughter, Mrs. Marie Jelsma, the sum of Two Thousand Dollars ($2,000.00) to be paid, prior to final distribution by the Court of my estate, from moneys then on hand or from the proceeds of sale of any of my real estate or personal or mixed property which my executrix may direct be sold for such purpose, and in all things as my executrix may direct. I specifically provide that none of my real estate be burdened with this gift and devise in this Fourth paragraph provided; and I provide further that

this gift and devise to my said beloved daughter, Mrs. Marie Jelsma, shall be inoperative if my said beloved daughter or any of her heirs in any way contest this will and testament or in any way attempt, directly or indirectly, to make it or any of its provisions inoperative.

'Fifth—I give and devise all the rest, residue and remainder of my property, real, personal, and mixed, and wheresoever situated, unto those of my beloved Children herein named who are now living being: Joseph Dean (now fourteen years of age), Thomas Dean (now twelve years of age), and John Dean (now nine months of age), sons, and Patricia Dean (now six years of age), daughter, share and share alike—that is an equal undivided interest unto each of them surviving me.'

Clearly under the ante-nuptial contract and will defendant in error was to receive only $2,000.00, one-third was to be distributed to decedent's wife, Mary Dean, and the residue in said estate was to be distributed equally to their children, to-wit: Joseph Dean, Thomas Dean, John Dean and Patricia Dean.

"(3) That the decree and judgment of this Court overlooked the fact that the District Court by its judgment sought to determine the heirs of Julia Dean, deceased, and to make distribution in her said estate, and that the said action on the part of the District Court and on the part of this Court invades the province of the County Court and is in violation of the said plaintiffs in error's constitutional rights under both the Constitution of the State of Oklahoma and the Constitution of the United States in that said plaintiffs in error are thereby deprived of their property without due process of law and in that the said plaintiffs in

error are thereby denied the equal protection of the laws.

"(4) That the decree and judgment of this Court overlooked the admissions made by the pleadings by reason of the failure of the defendant in error to file and verify a reply denying the affirmative defenses raised by the plaintiffs in error in their answers as amended, to-wit: That the said ante-nuptial contract was cancelled by the parties; that subsequent wills were made and the will dated May 3, 1938, was admitted to probate; that the only interest of the defendant in error was as a salaried employee which employment was terminated; that defendant in error knowingly permitted decedent to will and contract concerning said property as his sole property and is estopped to deny that the property was that of the decedent; that the property was so held and funds so used with knowledge of the defendant in error such that the purported trust was repudiated; that the cause of action for an accounting did not accrue within two or three years prior to the commencement of the action and is barred by limitations; that defendant in error's cause of action did not accrue within fifteen (15) years next prior to the commencement of this action and is barred by limitations; that defendant in error brought no action on said contract prior to rescission by the parties and such action is now barred; that defendant in error permitted decedent to treat said property as his sole property for 32 years and is estopped to deny that the property was that of the decedent; that defendant in error is estopped by the judgment admitting the aforesaid will to probate; that defendant in error is guilty of laches and unreasonable delay in bringing this action—which admissions and new matter constitute a complete defense.

"(5) That the decree and judgment of this Court overlooked the fact that taking all of the competent evidence and the inferences arising from the same and the admissions made by the pleadings in this case, and the law applicable thereto, the defendant in error has failed to prove her cause of action against the said plaintiffs in error, and each of them; the findings of fact and conclusions of law and judgment, decision and orders of the trial court are not sustained by the evidence but are clearly against the weight of the evidence, are contrary to the evidence, and are contrary to law; and these plaintiffs in error are entitled to judgment against the defendant in error.

"(6) That the decree and judgment of this Court overlooked the fact that this is an action for the recovery of specific real property and said plaintiffs in error were entitled to a trial by jury, and that the denial of the same was in violation of the Seventh Amendment to the Constitution of the United States and was in violation of said plaintiffs in error's constitutional rights under both the Constitution of the United States and the Constitution of the State of Oklahoma in that said plaintiffs in error are thereby deprived of their property without due process of law and in that the said plaintiffs in error are thereby denied the equal protection of the laws.

"(7) That the decree and judgment of the Court overlooked the fact that defendant in error contends that she is entitled to her mother's share on the theory that she received it by inheritance and gift. Her mother's estate (if any) was not probated and had there been an estate, and had it been probated defendant in error would only have been entitled to receive one-half of her mother's estate which, if all of the property of plaintiff's father and mother had been jointly owned, would have entitled plaintiff to receive only *one-fourth*

of the total property owned by plaintiff's father and mother. However, her mother's estate was not probated because she had none. The legal title to all property was in her father and the presumption is that he owned the equitable title also.

"WHEREFORE, plaintiffs in error pray that a rehearing of said cause may be granted by your Honorable Court."

* * * * * * * * *

"Comes now plaintiff in error, Mary Dean, executrix of the estate of Joseph Charles Dean, deceased, and for her petition for rehearing herein, respectfully represents and states to the Court that on the 25th day of June, 1957, in the above proceeding a decree and judgment was rendered by this Court affirming the judgment of the trial court and that she complains thereof upon the following grounds:

* * * * * * * * *

"II

"The majority opinion is predicated upon the basic premise that there was 'family property'—owned jointly by said decedent and the mother of defendant in error, usually referred to as Marie or Marie Katherine in the majority opinion. The mother is long since deceased. There is no evidence in the Record to support this basic premise. It is the 'first step' in the reasoning in the majority opinion. Of the point the dissenting opinion says: 'The evidence fails to disclose that plaintiff's mother had any property in her name at her death. Everything was in the father's name. * * * It was all his to do with as he pleased.' And then the dissent adds: '* * * there is NO EVIDENCE that would sustain the judgment rendered by the trial court in this case.' (Emphasis ours). The majority opinion quotes no evidence for this premise. The two dissenting Justices found none. We find none.

"III

"The 'second step' in the reasoning in the majority opinion is based upon the unjustified conclusion that there was a 'family property settlement.' Of this point the dissent says: 'Neither is there any evidence that Marie and her father entered into a family settlement agreement, the statement in the majority opinion to the contrary notwithstanding.' The majority opinion quotes no evidence for this premise—the two dissenting Justices found none—we find none.

* * * * * * * * *

"VI

"The decision of this Court is in conflict with Title 15, Section 29, O.S. 1951, relating to third party beneficiary contracts. The attention of this Court was called to said statute, but the statute has been overlooked by this Court in its opinion.

"VII

"The decision of this Court passes upon feigned issues. The majority opinion seems to have followed Marie's brief—accepted it at face value, irrespective of our challenge of its authenticity—and, therefore feigned issues are over emphasized. One such is the competency of Marie to testify, an issue not urged in the briefs of plaintiff in error, but which was submitted by Marie and was urged only as a smoke screen to cover up the real issue, to-wit: the total lack of any evidence of the facts upon which any judgment in favor of Marie can be based.

"VIII

"Though under due procedure, the decision of this Court is an arbitrary exercise of judicial power, we respectfully submit, in that it deprives a citizen of this

State and of the United States of property upon the mere claims of Marie without evidence in support of those claims in violation of the due process and equal protection clauses of the Constitution of the United States and of the Constitution of Oklahoma, to-wit:

Sec. 7, Art. 2, Constitution of the State of Oklahoma

Art. 5 and Sec. 1, Art. XIV, of the Constitution of the United States.

All this appears from the face of the record in this case.

"IX

"In violation of the right of contract clauses of said Constitutions, the decision of this Court impairs the obligations of the contract between plaintiff in error and Marie's deceased father cancelling the antenuptial contract and canceling such contractual provisions, if any, as attend the first will and testament of said decedent, this in that under the statutes of this State (as interpreted by this Court at the time) the contracting parties had the absolute right under the statute to cancel the same as they did and, further, in that the decision of this Court in this case will establish a contrary interpretation and deprive the parties of their constitutional rights under their said contract of cancellation. The constitutional provisions being violated here by the decision of this Court are:

Sec. 15, Art. 2, of the Constitution of Oklahoma.
Sec. 1, Art. XIV, of the Constitution of the United States.

* * * * * * * * *

"WHEREFORE, plaintiff in error, for herself and those whose property she administers, and as executrix,

prays that a rehearing of said cause, with oral argument, may be granted."

The Supreme Court denied the petitions for rehearing (page 545 of Transcript) which denial appears as follows:

"THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

37,466—Mary Dean, et al. v. Marie Katherine Jelsma, nee Dean. Petitions for rehearing and application for oral argument denied.

"/s/ Earl Welch
Chief Justice"

Thereafter petitioners filed their written applications for leave to file their second petitions for rehearing (pages 546 to 567 and pages 568 to 592) the pertinent part of which appears as follows:

"Come now Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, and John Dean, plaintiffs in error, and respectfully show that heretofore, to-wit: On the 25th day of June, 1957, a judgment and decision of this Court was rendered affirming the judgment of the District Court of Oklahoma County in favor of the defendant in error and against plaintiffs in error; that thereafter and on the 10th day of July, 1957, these plaintiffs in error filed in said cause their petition for rehearing and motion for oral argument which said petition and motion was by the Court denied on the 10th day of September, 1957.

"That the opinion of this Court overlooked certain material provisions of the said ante-nuptial contract and is in conflict with controlling statutes and decisions as more fully appears from the attached second petition for rehearing.

"WHEREFORE, said plaintiffs in error pray for leave to file their second petition for rehearing, a copy of which petition is hereto attached together with brief in support thereof.

"Respectfully submitted."

* * * * * * * * *

"Come now, Joseph Dean, Thomas Dean, Patricia Catron, nee Dean, and John Dean, plaintiffs in error, and respectfully represent to the Court that on the 25th day of June, 1957, a decree and judgment was rendered by this Court in said cause Affirming the Judgment of the District Court of Oklahoma County wherein by virtue of the terms of an ante-nuptial contract the defendant in error was adjudged to be the owner of an undivided one-half interest in certain real and personal property, legal title to which had been in Joseph Charles Dean, now deceased, and declaring a trust thereon of such property in the hands of his executrix, and ordering conveyance thereof and an accounting.

"(1) That the decree and judgment of this Court overlooked provisions of the said ante-nuptial contract which specifically recited who the parties thereto were.

At page 8 of the opinion the Court stated:

> 'The contract was not one made merely for her benefit; she was actually a party thereto * * *. Under these facts 15 O.S. 1951, Sec. 29, can have no application.'

However, paragraph No. 1 of the said contract provided that the contract was entered into by and between Joseph Charles Dean and Mary Kahanek as parties thereto as follows:

> 'That this is a contract entered into by and between Joseph Charles Dean, age 54, and Mary

Kahanek, age 28, both of Oklahoma City Oklahoma, by which the said parties, for valuable consideration in hand paid, and for the further benefits hereinafter set forth, agree:'

The concluding paragraphs and execution of the contract show that it is only a contract between Joseph Charles Dean and Mary Kahanek. They appear as follows:

'Both contracting parties will hold inviolate and warrant the other from injury through violation of the contract's terms.

'This contract, consisting of six pages, with a part of the acknowledgments on the seventh page, is entered into the twenty-seventh day of October, 1922, A.D. at Oklahoma City, Oklahoma.

'/s/ Joseph Charles Dean
'/s/ Mary Kahanek

'State of Oklahoma)
) SS.
'County of Oklahoma)

'Joseph Charles Dean and Mary Kahanek, personally known to me, of lawful age, being first duly sworn, state: they have read the above and foregoing contract, thoroughly understand it and have signed the same for the purposes and intent of entering fully into each and all of its provisions.

'/s/ R. E. Moon
Notary Public

'(Seal)

'My commission Expires July 21, 1925.'

Clearly the parties to this contract were only Joseph Charles Dean and Mary Kahanek. Hence the law ap-

plicable to third party beneficiaries should be applied in this case and this Court should hold that the said contract was rescinded not only as between the parties thereto but also as to the said defendant in error whose interest, if any, was as a third party beneficiary.

* * * * * * * * *

"(3) That the proceedings, decision and judgment of the trial court and the decree and judgment of this Court affirming the proceedings, decision and judgment of the trial court, are in violation of the constitutional rights of these plaintiffs in error under both the Constitution of the State of Oklahoma and of the United States in that the said plaintiffs in error are deprived of their property without due process of law and are denied the equal protection of the laws and that the same impairs the obligations of contract. The action of the trial court and of this Court relating to the admission of evidence and the sufficiency thereof and in repeatedly disregarding the proven and admitted facts and in failing to apply the law to the facts in the case at bar, and in creating and enforcing a new contract and in impairing the obligations of contract are in violation of said plaintiffs in error's constitutional rights as aforesaid and violate the Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

"WHEREFORE, plaintiffs in error pray that a rehearing of said cause may be granted by your Honorable Court."

* * * * * * * * *

"Come now Mary Dean, Executrix of the estate of Joseph Charles Dean, deceased, and Mary Dean, individually, and petition the Court to allow them to file herein their Second Petition For Rehearing, copy of

which is attached hereto, and as grounds show the Court.

"Said plaintiffs in error respectfully submit they and their attorneys of record are at loss to explain the denial of their first petition for rehearing.

"Most respectfully, we would explain we have information some of the Justices are doing two things: (1) considering it important whether the 'dead man' statute was waived by plaintiffs in error and (2) relying for their positions upon a statement in the Record that appears to be a waiver.

"The statement in the Record is this:

'Q. You may answer that question and tell us whom you acquired it (certain property) from?

A. I acquired it from my father' (C-M. 185-186)

"If the information that comes to us be correct, then there may have been a misrepresentation, we fear, because the interrogatory in question was not propounded to defendant in error by us but was asked her by her own attorney (immediately after she was cautioned by us about the twelfth time not to tell of any transaction between her and her deceased father), and, more, because after she answered we promptly moved to strike—a motion the trial court would not pass upon because it threw in the whole deposition in one fell sweep as a mere document (again, over repeated objections).

"And, if our information be correct, a further grave error is being made because the fact is that in the deposition there is no competent testimony to support the trial court's judgment.

"The Majority Opinion, as to which we seek now a second time to have a rehearing, overlooks:

1. Questions decisive of the case, some of which were called to the attention of the Court and some of which were not;

2. That the antenuptial contract is void as against public policy insofar as defendant in error is concerned;

3. That the statements in the briefs of defendant in error can not be relied upon—are erroneous—and that the case stated in the Majority Opinion is wholly fictitious insofar as material facts are concerned;

4. That the issue of whether the dead man statute was waived is a feigned issue, and an unimportant issue;

5. That the Majority Opinion is an arbitrary exercise of judicial power under due procedure, depriving parties of property on mere claims and without the slightest evidence in support thereof, all in violation of the constitutions of the United States and the State of Oklahoma; and

6. That the interpretation placed upon the third party beneficiary statute of Oklahoma impairs the obligation of contracts in violation of said constitutions.

"All these things we develop in our said second petition for rehearing. We show the questions they suggest. And we carefully analyze the Majority Opinion, showing why it should not be allowed to stand. We point out a multitude of misstatements, showing their materiality and the prejudice to plaintiffs in error which attends these mis-statements. These things did not occur to us as important, and we did not go into them directly or effectively, in our first petition for rehearing.

"Therein, too, we develop basic and controlling principles of law, which have been overlooked—in effect, if not actually. These are:

1. To establish a trust the evidence must be clear, cogent, and convincing, and the burden is upon him who seeks to establish the trust.

2. The evidence relied upon must show the exact rights and relations of the parties—something upon which a trial court can intelligently and equitably word its judgment.

"We show therein that a number of Oklahoma City attorneys have checked the Record in this case and are convinced the evidence is insufficient. These attorneys found *that the only semblance of evidence to uphold the trial court's judgment consists of oral testimony of oral statements against interest made years ago by a deceased person*, and they have suggested that such evidence stands branded by this Court *as the weakest of all evidence*. This point we develop. It is clearly a controling principle of law here.

"We make and develop the point that defendant in error traced no property into any trust. We point out that the Majority Opinion blows hot and cold: saying to make one point that defendant in error was entitled to believe certain property belonged to her father alone and then, in almost the same breath, relying upon the position that defendant in error owned in her own right half of the very same property.

"And, for the first time, we emphasize to the Court the moral issues involved, features we feel sure the Court has overlooked through no fault of ours.

"We feel sure due consideration of our proposed second petition for rehearing will cause this Court to withdraw the Majority Opinion and adopt, instead, the

dissent by the Honorable Justice Halley, with direction to the trial court to enter judgment for plaintiffs in error; and we would remind that the Honorable Justices Williams and Blackbird also dissented.

* * * * * * * * *

"Come now Mary Dean, Executrix of the estate of Joseph Charles Dean, deceased, *et al.*, and for her second petition for rehearing, by leave of Court submits the following argument and authorities in support of the following propositions:

* * * * * * * * *

"3. That the case stated in the majority opinion in so far as material facts are concerned, is wholly fictitious.

"4. That the majority opinion having adopted the brief of counsel for defendant in error and the writer apparently not having read the record or the briefs of plaintiff in error, Mary Dean, Executrix, passes on a feigned issue, an issue not only not presented by the plaintiff in error but one specifically disavowed by her in her reply brief.

"5. That the majority opinion of this Court is an arbitrary exercise of judicial power under due procedure in that it, after notice, deprives parties of property on mere claims without the slightest evidence in support thereof, in violation of the due process of law and equal protection clauses of the constitution of the United States and the constitution of Oklahoma.

"6. That the interpretation placed upon the third party beneficiary statute of Oklahoma impairs the obligation of the contract of the parties in violation of the constitution of the United States and the constitution of Oklahoma.

"7. That, while there is serious error in the admission of the deposition, this mistake has probably been overemphasized for the reason that the error, although flagrant, is harmless for the reason that there is not one scintilla of evidence in the deposition in support of the case of defendant in error.

* * * * * * * * *

"IT IS THEREFORE, respectfully submitted that a rehearing should be granted and that on the rehearing the majority opinion should be reversed and a judgment directed for plaintiffs in error upon the record."

The Supreme Court denied the applications for leave to file second petitions for rehearing (page 593 of Transcript) which denial appears as follows:

"THE CLERK IS HEREBY ORDERED TO ENTER THE FOLLOWING ORDERS:

"37466—Mary Dean, et al. v. Marie Katherine Jelsma, nee Dean. Applications for leave to file second petition for rehearing and motion for oral argument denied.

/s/ Earl Welch
Chief Justice"